Supreme Court, U.S.
FILED

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No. 95OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW AND MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals has sanctioned the 18-year conduct by the District Court of allowing the manufacturing-inventor petitioner to get to trial for a patent infringement 'remedy' only on patents whose 'routine life' has expired?

(2a) Whether the Constitutional standard of compensation to inventors is "[F]or limited times ... the exclusive right to their respective ... discoveries?" [Emphasis added.] (2b) Whether a single period of time that includes unsuccessful challenges: to a patent's validity; and/or infringement; is Constitutional?

(3a) Whether clause 8 of Const. Art. I § 8 is the specific mechanism in the Const. for all people to attain equal rights and opportunities? (3b) To attain the public interest in 35 U.S. Code, does the 'remedy' of 35 U.S. Code § 281 require § 283 be mandatory? (3c) Whether the present final order remedy constitutes an unCon-gressional judicially forced compulsory license? Is House Docu-ment 103-316 Vol. 1 p. 1642 GATT *Article 46* proportional here?

(4) Is the phrase "from the date of this grant" in the inventor's grant from the Patent & Trademark Office unCongressional and/or unConstitutional?

(5) Whether the District Court's denial of an evidentiary hear-ing at which the Petitioner would present evidence of his entitlement to equitable relief[1] denied him due process of law?

(6) Whether the District Court had jurisdiction to enter the Orders of 4 April 1995 and 18 April 1995. If so, was exercising post-judgment jurisdiction and relief to adjudicate a fee dispute with (former) counsel who had been discharged or withdrew from the case in conflict with Eleventh Circuit's *Scutieri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D.Fla.1993)?

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

QUESTIONS PRESENTED (Con't.)

(7a) While the Constitution directs the Congress to promote the progress of science and the useful arts, do the Fed. R. Civ. P. used in the 35 U.S. Code § 281 civil action for a 'remedy' for patent infringement result in punishing the inventor of a successful[2] invention? (7b) Is the inventor to be held responsible to the Judicial Branch for the large number of infringers requiring civil action 'remedy?' (7c) Is a successful invention seen by the Judicial Branch as good? (7d) Are the Fed. R. Civ. P. adequate to result in such a 'remedy' and to protect the public interest?

(8) Are the Constitutional rights of the inventor inferior to the Amendment VI rights of the criminal, regarding; priority in access to the Courts; and, to representation when in those Courts?

(9a) Is it an abuse of discretion for the District Court to require the jury to find the infringement is wilfull before an evidentiary hearing is allowed at which evidence would be presented to show the entitlement of the manufacturing-inventor to equitable relief? (9b) When the jury found four out of four patents to be infringed?

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[2] Adjudged infringers thusfar are: Ford Motor Company; Chrysler Corporation; and American Motors Corporation; with alleged infringers: Daimler-Benz Aktiengesellschaft; Dr. Ing. h.c.f. Porsche A.G., SWF-Specialfabrik fur Autozebebor Gustav Rau G.m.b.H., Volkswagen Werke A.G. Wolfsburg, Audi NSU Auto Union, A.G. Ferrari S.p.A., AB-Volvo, Alfa Romeo S.p.A., Automobiles-Citroen, S.A., Bayerische Motoren Werks, A.G., B-L, PLC (British Leland), Fuji Heavy Industries, Ltd., Group Lotus Cars Co., Honda Motor Co., Isuzu Motor Co., Ltd., Mitsubishi Motors Corp., Nissan Motor Co., Ltd., Officiene Alfiere Maserati, Peugeot, S.A., Regie Nationale Renault, Rolls Royce Motors, Ltd., Saab-Scania AB, Toyo Kogyo Co., Ltd. (Mazda), Toyota Motor Co., Ltd., General Motors Corporation, Brown's Buick & Isuzu, United Technologies Corp., United Technologies Automotive, Inc. comprising 15 million infringements with sales of $750 million annually.

PARTIES TO THE PROCEEDINGS

There are but three parties to the proceedings: Robert W. Kearns ("Dr. Kearns") as Petitioner; Chrysler Motors Corp.; and American Motors Corporation as Respondents.

Reed Smith Shaw & McClay, P.C. ("RSSM") and Arnold, White & Durkee Corporation ("AW&DC") are not parties, nor do they have standing. Nor did they intervene under Fed. R. Civ. P. Rule 24. Nor did they follow the local rules in filing new appearances in the case. Nor did they proceed *pro hac vice* in the Michigan Federal Court system. Their attorneys' first appearance is no longer viable.

Others, that included: KLH, P.C. personnel Patrick A. Keenan and Daniel J. Henry, Jr.; Vincent L. Barker, Jr. and Phyllis J. Kearns also were not parties, nor intervenors, nor have standing, nor file appearances, nor proceed *pro hac vice* in the Michigan Federal Court system.

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The Washington Post
editorial reads
"The Other Deficit"
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CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 8

The Congress shall have the power:

> To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have com-pulsory process for obtaining witnesses in his favor, and to
> have the Assistance of Counsel for his defence.

TREATY

General Agreement on Tariffs & Trade:
URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, House Document 103-316, Vol. 1, 103d Congress, 2d Sess. 27 September 1994.

Article 42

Fair and Equitable Procedures

Members shall make available to right holders civil judicial procedures concerning the enforce of any intellectual property right cover by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, in-cluding the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning manda-tory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to iden-tify and protect confidential information, **unless this would be contrary to existing constitutional requirements.** (**Emphasis** added.)

Article 46

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, **un-less that would be contrary to existing constitutional require-ments**, destroyed. The judicial authorities shall also

have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing ghoods be, sithout compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for propor-tionality between the seriousness of the infringement and the re-medies sordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce. (**Emphasis** added.)

STATUTES

28 U.S. Code:

§ 1654 Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct
causes therein.

(As amended May 24, 1949, c. 139, § 91, 63 Stat. 103.)

35 U.S. Code:

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification and drawings for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

(July 19, 1952, c. 950, § 1, 66 Stat. 804)

STATUTES (Con't.)

§ 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent.

(July 19, 1952, c. 950, § 1, 66 Stat. 812)

STATUTES (Con't.)

§ 283 Equitable[1] Relief

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity

to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

(July 19, 1952, c. 950, § 1, 66 Stat. 812)

§ 284 Damages

Upon a finding for the claimant the court shall award the claim-ant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

When the damages are not found by a jury, the court shall assess them. In either event the court may increase the damages up to three times the amount found or assessed.

The court may receive expert testimony as an aid toa the deter-mination of damages or of what royalty would be reasonable under the circumstances.

(July 19, 1952, c. 950, § 1, 66 Stat. 813.)

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189, 26 L.Ed. 975.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert W. Kearns ("Dr. Kearns") prays that the Court issue a writ of certiorari to review the Questions Presented and those fairly included therein.

OPINIONS BELOW

The Final Judgment and the Orders of 4 & 12 April '95 of the District Court; the Orders of 13 February '95 in CAFC No. 95-1016, of 28 June '95 in CAFC No. 95-1334, and, of 19 September '95 in CAFC No. 95-1334; AW&DC's Certificate of Service; Dr. Nobel's medical orders sent to the CAFC and Supreme Court; are located in the appendix herein. Opinion supporting the Final Judgment is at 32 F.3d 1541 (1994).

JURISDICTION

Jurisdiction to review this petition by writ of certiorari is conferfed upon the Court by 28 U.S.C. § 1254(1) (1988). The District Court had jurisdiction over the claims in the first instance under the provision of 35 U.S.C. § 1338(a) (1970).

STATEMENT OF THE CASE

Overview

Entry Date	District Court Docket Event #	Action
16 Oct '91	171	Phyllis Kearns' 'claim'... .
28 May '92	465	RSSM's 'notice' of charging lien
8 Jun '92	478	AW&DC's 'Motion' for charging lien
25 Jun '92	497	Motion for Judgment as Matter of Law
29 Oct '92	571	Final Judgment ¶6 All claims, prayers, requests, and motions for relief not specifically adjudicated herein are denied and dismissed with prejudice.
8 Jun '93	651	Opinion & Order denying J as M of Law
16 Jun '93	652	Motion to Yet Allow Evidence to Grant Dr. Kearns Equitable Relief to Bring Judgment into Accord with the USA's Position Under the General Agreement of Tariffs & Trade in the Uruguay Round

29 Jun '93am	653	Order—no jurisdiction in the premises—652
29 Jun '93pm	667	Notice of Appeal filed to CAFC by Kearns
2 Jul '93	660	AW&DC's 'motion' for ... attorney fees
12 Jul '93	662	AW&DC's Notice of Appeal for ¶6 dismissal
23 Sep '93	681	RSSM's 'application'... for fees & bonus
25 Oct '93	683	AW&DC's appeal of ¶6 (#93-1468) dismissed
7 Sep '95	726	Barker's 'petition' ... for fees
11 Aug '94		CAFC Opinion — 32 F.3d 1541 (1994)
17 Mar '95		Petition for Writ of Certiorari denied (Chrysler 94-1131) [Kearns 94-1269]
28 Mar '95		DCMd Complaint collect bond 28 U.S.C. §§ 1352 & 281
4 Apr '95	743	Order—Payment of Money into Court
12 Apr '95	747	Order-Distribution of Funds ...
12 Apr '95	750	Order-Discharging Chrysler

Writ of Certiorari is sought for the patents of a manufacturing-inventor ("Dr. Kearns") so that he might export Intermittent Windshield Wiper System ("IWWS") subassemblies that would increase U.S. exports by 4.8%. The dwell time of the IWWS sub-assembly would be automatically varied in response to the number of raindrops accumulated in the wiped viewing area since the last wiping stroke. The subassembly would consist of windshield, wiper blades, wiper motor(s), drive mechanisms, electronic controls, connector and mounting framework. It would utilize the 29 U.S. IWWS patents and those motor control and IWWS patents granted to Dr. Kearns throughout the western world.

55,000 U.S. persons alone, die in automobile accidents annually. More than half of those accidents occur in wet weather yet the weather is not wet half the time. That is in Dr. Kearns', his family, his co-workers, and the interest of the

public and the promotion of science and the useful arts under Const. Art. I § 8 cl 8 as the inventor could then continue to be active in the field he created and continue to contribute to its progress and serve and increase the standard of living of the U.S. public.

Kearns' first 35 U.S.C. §281 Remedy
has not come to trial in 18 years.

32 years ago, Dr. Kearns sought specifications from the Ford Motor Company and Chrysler Corporation so he could apply for supplier status to the automotive assembly industry. 18 years ago, he hired his first litigating attorney, who filed his first 35 U.S. Code § 281 civil action for a 'remedy' for patent infringe-ment. That first civil action has yet to come to trial in 18 years! The 'routine' life of a patent is 17 years. To the District Court, the life of a patent is a single time period of 17 years, thus, Dr. Kearns' patents knowingly 'died' in the view of the District Court while awaiting trial to gain his 'exclusive right' whereas, the Constit-utional standard of compensation to the inventor is the 'exclusive right' for 'limited times'. Dr. Kearns' U.S. patents have not 'died' under 35 U.S. Code. Only the commonly recognized 'routine life' of those patents have expired.

GATT Treaty is now effective U.S. Law

As of 8 June 1995, the General Agreement on Tariffs and Trade treaty ("GATT") became U.S. law. It is impossible for the words of a single treaty to satisfy the people of every country in the world. Consequently, the GATT *Articles* presently and frequently contain the phrase, "unless this would be contrary to existing constitutional requirements." Should this Petition be denied now, the erroneous interpretation of "exclusive right" for "limited time" of the District Court will have been affirmed under GATT for the U.S. Constitution and 35 U.S. Code patent law that will degrade: the future U.S. standard of living; the level of the economy of the U.S. people

under GATT; and, will discourage rather than promote future invention.

Moreover, the patented IWWS are used by every automobile assembler in the western world who is active in the U.S. markets. Thus, the number of civil actions is large. If the Fed. R. Civ. P. are applied by the District Court to the alleged infringers in series, death of patents awaiting trial, *supra* will occur repeatedly. If the Fed. R. Civ. P. are applied by the District Court to the alleged infringers in parallel, the *pro se* inventor will drown in the paper work. Dr. Kearns believes and the total record shows, the present Fed. R. Civ. P. Rules punish the inventor for a suc-cessful invention while the Const. times are fair to the inventor.

The public interest is punished as well when the District Court denies twice, in two separate civil actions, *Ford* and *Chrysler, et al., infra*, an evidentiary hearing at which Dr. Kearns' attorneys (at that time) could present evidence of Dr. Kearns' entitlement to equitable relief under 28 U.S. Code § 283 and leaves the Supreme Court in a contrary stance, as will now be shown.

In early times, the Supreme Court extols that the public interest in the patent law is dominant. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665[1].

In the '80s, the Supreme Court exclaims the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohn and Haas Co.*, 448 U.S. 176,

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[1] *Pennock* v. *Dialogue*, 2 Pet. 1; *Kendall* v. *Winsor*, 21 How. 322, 329; *Adams* v. *Burke*, 17 Wall. 453; *Motion-Picture Co.* v. *Universal Film Co.* 243 U.S. pp. 510-511; *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493; *United States* v. *Masonite Corp.*, 316 U.S. 265, 278 ... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..."

221..

In '90 in *Kearns* v. *Ford Motor Company*, the jury found six out of six of Dr. Kearns' patents were valid, which Ford agreed in the pre-trial order meant that Ford's 20,500,000 IWWSs sold infringed Dr. Kearns' patents. Dr. Kearns' Kearns *Engineers* was denied supplier status by Ford. Ford manufactured their IWWSs internally by further integrating and expanding their company to include Philco Radio. All, then alleged infringers, who controlled Dr. Kearns' markets, also denied Kearns *Engineers* supplier status. Since the automotive assemblers each control their own markets, and each denied Kearns *Engineers* supplier status, Dr. Kearns could not manufacture his discoveries with the benefit of the economies of scale available, and, the infringers risk for damages under 35 U.S. Code § 284 was lessened by the District Court from 'adequate to compensate for the infringement,' for both the manufacturing inventor and the public to those of only a 'reasonable royalty'— the least damages—that deny the public certain benefits, *infra*, and are associated with damages of a non-manufacturer.

Now, in *Kearns* v. *Chrysler Corp. and American Motors Corp.*, although Dr. Kearns' Kearns and Law, *Engineers* was an approved supplier to Chrysler's Missile Division in the late '50s, Kearns *Engineers* was denied supplier status to supply Chrysler their IWWSs. *Chrysler, et al.* had stipulated earlier to be bound by the validity trial in Ford. The jury found four out of four of Dr. Kearns' patents to be infringed—in excess of 16 million infringements sold. Again as in *Ford*, and now in *Chrysler, et al.*, a request for an evidentiary hearing at which Dr. Kearns' could present his entitle-ment to equitable relief and to protect the public interest under 35 U.S. Code § 283 was denied (out of hand) without hearing the evidence. But, the threshold level to attain equitable relief from the

District Court had been raised by the Detroit District Court: From the Proceedings of 23 July 1992 page 22:

> JUDGE COHN: "If I had discretion to grant equitable re-lief in the form that Dr. Kearns prays for, in either the *Ford* case or the *Chrysler* case, based upon the fact the jury found infringement was not willful, I would never exercise that discretion in favor of an injunction. So that while I have heretofore taken the position that I had no power to grant equitable relief Dr. Kearns prays for, I think it should be made clear as we move forward in this case, had I the power[2], absent a finding of willfulness that was affirmed on appeal, I would never consider the exercise of it. That should not give you any comfort, Dr. Kearns, but I think it should allow you to think even further on that point."

While the Supreme Court recognizes the public interest in the patent law, 35 U.S. Code § 281 reads:

> **§ 281. Remedy for infringement of patent**
>
> A patentee shall have remedy by civil action for infringement of his patent.

Since it is the patentee who is to receive the 'remedy', the public interest can only be attained through the remedy to the patentee. That 'remedy' can consist of **§ 284. Damages** ,and,

§ 283. Injunction[3]

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[2] An analogous situation to that of Dr. Kearns is represented by the decision in *Burr* v. *Ambarch*, 883 F.2d 1071, 1078, vacated, 492 U.S. 902 (1989), reaffirmed on remand, 888 F.2d 258 (2d Cir. 1989). As held in *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964), federal courts have a duty to be alert to provide such remedies as are necessary to make effective the congressional purpose of statutes enacted by Congress.

[3] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189, 26 L.Ed. 975.

Owner of infringed patent may sue for damages at law in any event, but also is entitled to invoke equity jurisdiction for appropriate relief. *Activated Sludge* v. *City of Fort Worth*, C.C.A.Tex. 1937, 89 F.2d 278, *cert denied* 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 541.

> "The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."

Dr. Kearns was only allowed 'money' from both trials by the control of the Detroit District Court. Remember, the public interest is only attained through a § 283 remedy to the patentee. 'Money' (§284) to the inventor does not return a 'remedy' to the public interest. No matter how much income tax Dr. Kearns pays to the IRS, the public has been cheated of their important interest in the patent laws. While the Supreme Court utterances of 'dominant' then 'equal' appear high toned, the simple logic displayed above shows they are hollow unless this Petition is granted.

35 U.S.C. §284 Damages alone is an unCongressional compulsory license?

Moreover, an award of § 284 Damages alone is nothing more than the Detroit District Court forcing the inventor to grant the Detroit infringers a compulsory license under his patents. Dr.

If the remedy at law is not adequate the party whose patent has been infringed may resort to equity for relief by injunction. *McMillan* v. *Barclay*, C.C.Pa. 1871, 5 Fish.Pat.Cas. 189, Fed.Cas.No.8,902. *See also, Jonathan Mills Mfg. Co.* v. *Whitehurst*, C.C.Ohio 1893, 56 F. 589; *Henzel* v. *California Electrical Works*, Cal. 1892, 51 F. 754, 2 C.C.A. 495; *Brooks* v. *Miller*, C.C.Mich.1886, 28 F. 617; *Bragg* v. *Stockton*, C.C.Cal. 1886, 27 F. 509; *Brick* v. *Staten Island R. Co.*, C.C.N.Y. 1885, 25 F. 553; *Bicknell* v. *Todd*, C.C.Ohio 1851, 5 McLean, 236, Fed.Cas.No. 1,389; *Motte* v. *Bennett*, C.C.S.C.1849, 2 Fish. Pat.Cas. 642, Fed.Cas.No.9,884.

The general principles of equity jurisprudence control in patent cases as exemplified by this section. *Goodwin* v. *Randolph*, C.C.N.J.1884, 21 F.575.

Equity will entertain jurisdiction of a suit for infringement of a patent to prevent a multiplicity of suits. *Motte* v. *Bennett*, C.C.S.C.1840, Fed.Cas.No.9,884. (Emphasis added.)

Kearns has never licensed a single one of his 29 U.S. patents, nor one of his many, many foreign patents. Since the Detroit infrin-gers control the U.S. IWWS market, it means the future of the U.S. employment is in the hands of those who have to steal to keep up with progress.

A compulsory license section in the patent law has never been allowed by Congress[4]. A judicially forced compulsory

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[4] "The public's appraisal of the patent system has been elicited more than once by legislative proposals to introduce into it a compulsory licensing provision. Such a provision, while ostensibly leaving the system intact, would in fact reduce the value of the patent grant to a mere shadow, as the testimony on each occasion has made clear. The latest attempt was in March, 1938 when extended hearings were held on H.R. 9259 - the McFarlane bill. ... . Seventy of the seventy-four witnesses vigorously opposed the bill.

McFarlane Compulsory Licensing Bill; Hearing on H.R. 9259 before the O'Malley Committee, 75th Cong., 3rd Sess. (1938) as presented and discussed in *There is no Mystery About Patents*, Appendix B, by William R. Ballard, J.M. Barrett Corp., *Publishers*, 220 East 42nd Street, New York 17, N.Y. 1946.

RECOVERY IN PATENT INFRINGEMENT SUITS, Hearing before the U.S. Congress, House Committee on Patents. House of Representatives, 79th Congress, 2d sess., on H.R. 5231, A Bill to Amend Revised Statutes, 4921 (U.S.C. Title 35, Patents, Sec. 70), Providing That Damages be Ascertained on the Basis of Compensation for Infringement, as in Actions for Infringement in the U.S. Court of Claims. (Subsequently amended, reintroduced, and reported as H.R.5311) January 29, 1946

> Mr. C. Henry. ... How would such an arrangement work out in cases of trespass to realty? Suppose we had a law that only a reasonable rental could be collected for any such trespass, wouldn't that amount to a compulsory leasing of realty? Is it unreasonable to suppose that a person intending to trespass upon and occupy the realty would first offer to purchase a lease and, upon refusal, proceed to trespass and occupy anyway knowing full well that he wouldn't be out of pocket any more than if his offer had been accepted in the first place? The right to injunction in cases of patent infringement does not alter the situation because the granting of an injunction is not mandatory. ... .
>
> Mr. C. Henry. Gentlemen, before we close I would like to make

license is unCongressional! It is also stupid, as who is better equipped to lead future progress in the field than the (s)he who created it? Our country is dying from lack of exports—is it any wonder 6% underemployment is passed-off by economists to the man-in-the-street as 'normal' in our U.S. economy?

Post-'routine life'-expiration was raised
but not resolved in *Roche* v. *Bolar*

In Professor Chisum's book, REMEDIES FOR PATENT INFRINGEMENT, page 393 is written:

> A patent owner's right to monetary and **injunctive relief** is restricted by the equitable doctrines of laches and estoppel, the statutory six-year damage limitation, and the marking requirements. [**Emphasis** added.]

If that is all there is, why did the District Court not hear Dr. Kearns' lawyers' request for a hearing to present Dr. Kearns' entitlement to equitable relief? Dr. Kearns is not limited by his being guilty of these infractions.

At page 397, Professor Chisum writes:

> The possibility of post-expiration equitable relief was raised but not resolved in *Roche Products, Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858 (1984)

Later continuing activities were not good for Bolar's

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the suggestion that this committee reject every compulsory license proposal regardless of how it is hidden or in whatever disguised form it may be submitted to this committee. It has been rejected by every Congress that has considered the matter for the past 20 years, often after voluminous testimony.

The Chairman. All in favor of rejecting everything Mr. Stedman has said with reference to the last amendments, indicate by saying "Aye"; opposed, "No."

(The motion was unanimously carried.)
(Whereupon at 12:15 p.m., the committee adjourned.)

president[5].

Time_ v. Constitutional Times

Dr. Kearns' Petition is timely in world events. While Dr. Kearns' 'remedy' trial has not come to trial in 18 years in Detroit, Mercedes and Porsche cars continue to pour in over our borders into the U.S. to the diminishment of the purchasing power of the U.S.$ by a factor of two. Why two? Mercedes and Porsche cars have installed IWWSs made in Germany by German workers. The cost of the car is nominally $200 more than if Dr. Kearns had not been born. If Dr. Kearns' U.S. patents had been enforced by the Judiciary Branch, Herr Wittner had already said to Dr. Kearns, "Bob, if we have to buy 60,000 IWWSs from you to market our cars in the USA, then, please quote out world-wide production needs of 600,000." Which Dr. Kearns did quote as well as Porsche. Porsche's needs were 44,000 IWWSs world-wide. If his U.S. patents were enforced, Kearns *Engineers* would be employing U.S. people to make them and exporting U.S.-made IWWSs to Daimler-Benz & Porsche in Europe. The U.S. public are penalized by the loss of export out and are penalized by the increased cost of imports in — a difference of two.

But this loss of two need not happen as under the 35 U.S. Code, Dr. Kearns' patents have not expired. The law does not have to be changed. The words in the U.S. patent grant from the Com-missioner of Patents includes the phrase, 'from the date of this grant.' The words of the grant in 35 U.S.C. § 154 do not con-tain such a phrase. The date of starting the term (a term does not have a specified starting or ending date, but rather is a quantity of time) is not stated in § 154. How can an 'exclusive right' be granted at patent publication day when

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[5] Head-line of *The Washington Post*, Saturday, December 19, 1992 C7 Bolar Ex-President Admits Price Fixing, story by Paul Valentine.

the patent is being infringed that day? Ford & Chrysler were both infrin-ging Dr. Kearns' U.S. patents when they issued in 1967[6]. How can an exclusive right 'tick away' during an unsuccessful challenge to the validity of U.S. patents as happened to Dr. Kearns in Ford & Chrysler? It can't, logically. How can an exclusive right 'tick away' during an unsuccessful challenge to infringement of U.S. patents as happened to Dr. Kearns in Ford & Chrysler? It can't, logically. These examples fit the Constitutional language of 'limited times' where the 17 year quantity of time consists of multiple shorter time periods totalling 17 years. Judge Cohn's interpretation of a single period of time certainly can't meet the logic of the questions just asked, while limited times can. And, multiple shorter time periods totalling 17 years is compatible with 35 U.S.C. § 154, also. The law provides that the Commissioner be notified of jud-icial action. The Commissioner, through his staff (filling seven buildings in Crystal City, Va.), is the time-keeper. The U.S. Constitution's 'limited times' applies to all U.S. inventor's 17-years of 'exclusive rights.' The present interpretation of the law is wrong, unfair, unConstitutional, and not in the public interest! The GATT treaty *Articles* allows for such variations in the treaty-members Constitutions by frequently reciting the phrase, "unless this would be contrary to existing constitutional requirements."

Moreover, the Circuit of the District Court has a rule that denies justice to the Cohn-Kearns civil actions of successful

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[6] "[U]nlicensed experiments conducted with a view to the adaption of the patented invention to the experimentor's business is a violation of the rights of the patentee to exclude others from using his patented invention. It is obvious here that it is a misnomer to call the intended use *de minimis*." *Roche Products Co.* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858, 863 (Fed. Cir. 1984).

inventions, *supra*, namely, from the transcript of proceedings of 23 July '92, Judge Cohn before Dr. Kearns and 13 defense attorneys[7] p. 16, starting line 3:

> THE COURT: Thus far, it seems to me that the only one who has really been thinking about the disposition of these cases is the Judge.
>
> And I have a new problem. All these cases are more than five years old, and the Sixth Circuit has adopted a rule that you can't go out of the circuit as a visiting Judge if you have any case on your docket more than five years ld. So these cases are likely to pin me to the Eastern District of Michigan. If I want to go to the Northern District of Illinois, or the Middle District of Florida as a visiting judge, I may not be able to do so because of these cases. You know, that's as incentive to get rid of them.
>
> I'm not going to ask you to dismiss them, Dr. Kearns, and then refile them so the five years starts running all over again. I mean, I could do that, but we don't want to do that.

The record shows that all Dr. Kearns' patent infringement 'remedy' civil actions have now been dismissed!

Moreover, the infringers, not being hampered by the 'best mode' requirement of 35 U.S. Code § 112 as they are already outside the law, have not copied the best mode contained in Dr. Kearns' patents so that 700 million IWWS which are inherently unsafe have been unleashed on the roadways of the western world. Each year 55,000 U.S. people die in automobile accidents - half of which occur in wet weather - yet the weather is not wet half the time.

Gatt's *Article 46* states in pertinent part:

> "The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods

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[7] The Motions to Dismiss Dr. Kearns' cases, literally poured into the Court.

> be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements."

Thus, Dr. Kearns needs his full § 284 damages to purchase the implements, even at scrap prices, *supra*. The Court of Appeals for the Federal Circuit has allowed the District Court to im-properly dispense $10.7 million, more than half of those dam-ages, to others who are not properly before the District Court and lack standing. Those disbursements came out of District Court proceedings that, from beginning to end, occurred while the juris-diction was at the Court of Appeals and the Supreme Court and were not provided for in the Final Order that was affirmed with *certiorari denied* by the Supreme Court on 17 March 1995.

REASONS FOR GRANTING THE WRIT

The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct. *Turner* v. *Bank of North America*, 4 Dall. (4 U.S.) 8 (1799); *Bingham* v. *Cabot*, 3 Dall. (3 U.S.) 382 (1798); *Jackson* v. *Ashton*, 8 Pet. (33 U.S.) 148 (1834); *Mitchell* v. *Maurer*, 239 U.S. 237 (1934). The § 284 Damages money recipients: Arnold, White & Durkee Corp. ("AW&DC"); Reed Smith Shaw & McClay ("RSSM"); Vincent L. Barker, Jr.; KLH, P.C. and it's Patrick A. Keenan & Daniel J. Henry, Jr.; nor Phyllis Kearns have not established the jurisdiction of the court over them, nor have they shown that they have standing in which to bring: AW&DC's 'motion' [Docket Event #660]; RSSM's 'application' [Docket Event #681]; Vincent L.Barker, Jr.'s 'petition' [Docket Event #726]; Phyllis J. Kearns' 'claim' [Docket Event #171]. Moreover, AW&DC's, RSSM's and Phyllis Kearns' money 'requests' were denied with prejudice in ¶6 of the Final Judgment and are thus subject to *res juricata*.

Non-party damage recipients were improperly before the Court without standing

Standing is a limitation on judicial power as well as a limitation on the capacity of federal courts to receive jurisdiction. Without standing there is no case or controversy and no subject matter jurisdiction under Article III of the U.S. Constitution. Chief Justice Marshall has held that

> "judicial power is capable of acting only when the subject is submitted in a case, and a case only arises when a party asserts his rights in a form prescribed by law. *Osborn* v. *U.S. Bank*, 9 Wheat (22 U.S.) 738, 819 (1824).

From viewing the Overview (p. 1), ¶6 of the Final Judgment[8,9] dismissed with prejudice[10]: Phyllis Kearns'

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[8] Upon collateral attack the validity of a judgment cannot be determined except upon the record. (citing *Stockyards Nat. Bank* v. *Presnall*, 109 Tex. 32, 194 S.W. 384.) Unless the record negatives the existence of facts that are essential to the court's jurisdic-tion, the law conclusively presumes upon collateral attack that those facts were established by the evidence. *Crawford* v. *McDonald*, 88 Tex. 626, 630-632, 33 S.W. 325; *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329; *Moore* v. *Hanson*, 101 Tex. 293, 106 S.W. 876 ...) in *Security Trust Co. of Austin* v. *Lipscomb County*, 180 S.W.2d 151, 156 (Supreme Court of Texas, 1944).

Fed. R. Civ. P. Rule 54's 1946 Amendment states:

> Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in special circumstances covered by statute ... . It [Rule 54(b)] was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin* v. *United States*, 1945, 65 S.Ct. 631, 324 U.S. 229, 89 L.Ed 911. (Emphasis added)

[9] Fed. R. Civ. P. Rule 58. Entry of Judgment states in relefant part:
"[E]ntry of judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before

'claim'; RSSM's 'notice'; and, AW&DC's 'motion'. AW&DC appealed to the CAFC (#93-1468) with the appeal being dismissed by the CAFC. Neither RSSM nor Phyllis Kearns appealed their dismissal. *Res judicata* applies to these non-party claims (if the non-parties have standing—which they don't, as well.)

Dr. Kearns' wasn't timely served
by AW&DC in CAFC No. 95-1016 dismissal

AW&DC's legal paper in CAFC No. 95-1016 failed to be served upon Dr. Kearns until 9 days after the Circuit Judge ruled in CAFC No. 95-1016 and dismissed that appeal. Dr. Kearns would need to be served that paper to know it required a re-sponse. Additionally, Dr. Kearns was under a doctor's order not to work on the case for 60 days, which he obeyed, during that same time. AW&DC had been timely served a copy of the doctor's order, so they knew he was inactive (wasn't even in the country). The Supreme Court granted Dr. Kearns' Applications (A-328 & A-329) for an enlargement of time and the Supreme Court did serialize their work-load on Dr. Kearns to make it possible for a one-may team to do it. In comparison, the CAFC ignored the Supreme Court's notice that it had helped Dr. Kearns, which Dr. Kearns took as a nudge for them to do likewise. The CAFC dismissed Dr. Kearns' application for an enlargement of time and to serialize their work load moments after it dismissed 95-1016! The

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a notice of appeal has been filed and becomes effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59." **(Emphasis added.)**

[10] A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. *Fayerweather* v. *Ritch*, 195 U.S. 276

CAFC conduct was unfair and unprofessional to-ward Dr. Kearns' appeal, in his view. Nor did the CAFC even question the CAFC's jurisdiction over AW&DC and/or RSSM, or question their 'standing' before the Court. The case was dismissed because Dr. Kearns did not serve those who are improperly before the court without standing. Dr. Kearns served party, Chrysler Corporation. **CAFC on 19 Sept. '95 denies a *pro se*, as not on point — but does not say what the point is!**

Equitable Relief denied to Kearns — again

During the window-of-opportunity between 8 June '93 and 29 June '93, before jurisdiction was transferred to the CAFC, the District Court's Fed. R. Civ. P. Rule 58 time

> "before a notice of appeal has been filed and becomes effective"

to act on fees under Rule 58 expired. However, Dr. Kearns' motion:

> "To Yet Allow Evidence to Grant Dr. Kearns Equitable Relief to Bring Judgment into Accord with the USA's Position Under the General Agreement on Tariffs and Trade ("GATT") in the Uruguay Round"

was entered and was denied for lack of jurisdiction in the premises. The GATT motion dismissal qualified for the CAFC appeal and this Supreme Court petition for writ of certiorari.

AW&DC were alert that their 'motion' for a charging lien had been dismissed by the District Court in ¶6 of the Final Order and they appealed. RSSM did not appeal. Phyllis Kearns did not appeal. The court of appeals dismissed AW&DC's (# 93-1468) appeal of the dismissal of a 'motion' **by a non-party** for a charging lien just as in *Scuteri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D. Fla. 1993) **but revive on 19 Sept?**

AW&DC re-filed a 'motion' for attorney fees, RSSM re-filed an 'application' for attorney fees and a bonus (which is not proper within even their letter agreement), Barker filed a

'petition' for fees. All the money recipients' are not properly before the court with standing.

The Florida Court has questioned the dismissed (RSSM) or fired (AW&DC) lawyer's right to assert a motion in the case they have left. Like the lawyers in *Scuteri, et al., supra*, RSSM and AW&DC lawyers

> "sole basis for appearing in this case is that it represented Plaintiffs several years ago. There is no question that (they) are not a party."

Likewise, the Eleventh Circuit has held that a non-party, which includes: KLH, P.C.'s Patrick A. Keenan and Daniel J. Henry, Jr.; Vincent L. Barker, Jr.; and Phyllis Kearns that never made or filed an appearance; and, AW&DC and RSSM who withdrew their appearances, lacks standing to bring a Rule 60(b) motion. *Kem Manufacturing Corp.* v. *Wilder*, 817 F.2d 1517 (11th Cir. 1987). Since Rule 59 refers only to parties, and is thus more restrictive than Rule 60, it is logical to conclude that the same analysis applies. Accordingly, non-parties would not have standing under any other provision, such as Rule 7(a) which provides for motions. In short, the Fed. R. Civ. P. refer to parties and RSSM and AW&DC and KLM, P.C.'s Patrick A. Keenan and Daniel J. Henry, Vincent L. Barker, Jr. and Phyllis Kearns do not qualify as parties, and, the order of 30 August 1994 as it applies to each of them is void. Yet, the Court of Appeals for the Federal Circuit ("CAFC") allows the order of 30 August 1994 to stand, which is in conflict with the Court of Appeals for the Eleventh Circuit's view of the law.

The non-party damages recipients
failed to intervene in the Detroit action.

Since AW&DC was neither a party or an attorney of record in the cause, and *res judicata* applies from AW&DCs dismissal in the Final Judgment, the AW&DC 'motion' and continued appearance before the CAFC is improper.

> "[M]ovants are non-parties since they have failed to move for leave to intervene in this proceeding for purposes of lifting the protective order thus they have no standing to bring this motion." *See, Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979) and cases cited therein.

It is generally viewed that motion can only be made by a party of record. *Gibbs* v. *Ewing*, 94 Fla. 236, 113 So. 730, 735 (---). AW&DC, RSSM, KLH, P.C., Patrick A. Keenan, Daniel J. Henry, Jr., Vincent L. Barker, Jr., and, Phyllis J. Kearns's non-party status preclude the § 284 Damages money they received.

A judgment is void if a court acted in a manner inconsistent with due process of law. *Union Switch & Signal* v. *Local 610*, 900 F.2d 608, 612 (3rd Cir.) quoting *Wright and Miller* § 2862. Assuming, the Court could properly hear the attorney's fees dispute at all, Dr. Kearns contends that neither AW&DC or RSSM invoked jurisdiction of the court. In this regard, AW&DC filed a "motion" for clarification of judgment and attorneys' fees. Likewise, RSSM's "application" for attorneys' fees. The attorneys should have intervened.

In order to participate in the District Court's cause of action, AW&DC and RSSM must at minimum intervene under the Fed. R. Civ. P. Rules. Rule 24 of the Fed. R. Civ. P. sets forth the manner in which to effect intervention and the rules for this procedure were not followed either by either RSSM or AW&DC. Clearly, the moving papers do not meet the standards of Fed. R. Civ. P. Rule 24 which requires both a motion and a separate claim for relief to effect an intervention.

By allowing the cause to proceed
outside the Federal Rules, the Court
ultimately worked to deny Dr. Kearns
his right to due process under the law.

By allowing the cause to proceed outside the Federal Rules,

the Court ultimately worked to deny Dr. Kearns his right to due process under the law. For example, if the prescribed procedure had been followed Dr. Kearns would have been on notice to assert his rights under Fed. R. Civ. P. Rule 12 and been provided with an opportunity to raise his objections on the basis of personal jurisdiction, subject matter jurisdiction, venue, as well as to assert his affirmative defenses. The proceeding of 12 Apr '95 occurred in a rush—before the time to Answer had run. Dr. Kearns' Answer to a claim for relief would have allowed him to frame the issues to be tried in the proceeding such as the equitable or legal basis for the dismissed attorneys to proceed with a charging lien.

> "In an action for enforcement of a lien, there should be a hearing on the issues of fact raised by the pleadings that is conducted under the rules governing trials generally." 51 Am Jur2d 200-201 §74 Liens. *Garner* v. *Houston*, 323 S.W.2d 659 (Tex Civ. App.)

The procedure allowed by the Detroit Court resulted in a situation where AW&DC and RSSM and others were allowed to "plead" without giving Dr. Kearns an opportunity to Answer and assert his defenses under Rule 12. Moreover, Dr. Kearns ob-jected to Judge Cohn at the 12 April '95 proceeding that the time to Answer had not yet run and his objections paper was not an Answer, but, Dr. Kearns' objection was promptly denied, as it seemed to Dr. Kearns the Distric Court was in a 'rush.' By attempting to obtain relief outside of the framework of the Federal Rules, those seeking funds were able to avoid the requirements of the Federal Rules.

The procedure followed also enabled the attorneys to proceed avoiding the local rules. For example, the docket sheets reflect that neither attorneys filed new appearances in the case or moved to proceed *pro hac vice* in the Michigan Federal Court system. The attorneys first appearance before both the District Court and the CAFC was no longer viable.

Michigan law does not recognize either
AW&DC's 'motion' nor RSSM's 'application'

The pleadings also do not conform to the minimum standards under Michigan Law which sets forth the conditions which should be considered before imposing of a charging lien.

> "[T]he lien was created by state law and thus state law standards apply to its measure. *In the Matter of Pacific Far East Line, Inc.*, 654 F.2d 664 (9th Cir. 1981). *See also, in re Diplomat Electric Inc.*, 499 F.2d 342, 348-349 (5th Cir. 1974).

To the extent subject matter jurisdiction is invoked by the movants which would allow this court

> "to determine by such regular proceedings as are established by law or custom for the protection or enforcement of rights ..." *In re Pacific Ry. Comm.*, 32 F. 241, 255 (C.C. Calif. 1887). *See also, Smith* v. *Adams*, 130 U.S. 167, 173-74 (1889)

it is submitted that such established law or custom in Michigan does not recognize filing either an "application" or "motion" for relief. Although there is no specific procedure devised under Michigan law, established Michigan Law demonstrates an attor-ney who elects to seek relief by imposition of a charging lien must proceed by intervention. *See, Kysor Industrial Corp.* v. *D.M. Liquidating Co., et al.*, 161 N.W.2d 520 (Mich. App. 1975) (Law firm Colista, Baum & Domonkos identified as "Intervening Defendants appellees"), or bring a separate action. *Rubel* v. *Brimacombe & Schlecte*, 86 B.R. (E.D. Mich. 1988). Thus, in the cases located which dealt with or recognized an attorney's charging lien, the attorney was identified as an intervenor or party. AW&DC and RSSM have no standing before the CAFC now, as well.

Substantively, the motion and application did not set forth the requirements which must be met in order to establish a charging lien under Michigan Law. Furthermore, Dr. Kearns submits that these facts should be set forth in an affirmative

pleading in order for a claimant to prove it is entitled to proceed. Dr. Kearns is entitled to clear notice of the nature of claims the "parties" are asserting and the basis for the claims. In this case, at minimum, Dr. Kearns should have been apprised of whether AW&DC were proceeding in the nature of an equitable lien or at common law under Michigan law. Further, the need and circumstances sur-rounding the creation of the requirement for a lien should be affirmatively plead.

> "Without some further evidence of the dispute or avoidance of a fee, the requirements for a charging lien have not been met." 829 F.Supp. 387, 392 (1993).

Neither papers filed by AW&DC or RSSM meet these minimum requirements. The "motion" by AW&DC and "application" by RSSM and 'petition' by Vincent L. Barker, Jr. do not meet the minimum pleading requirements and therefore are not effective to intervene. To the extent the motion and application are treated as intervention Dr. Kearns' failure to be apprised of the legal effect was that Dr. Kearns never knew that the attorneys were parties[11] and the Federal Rules applied to them when they have no appearance or standing. In CAFC Cir. Rule 12 on p. 92 for pro se parties, it states:

> "You must serve opposing counsel using the name and address contained on the entry of appearance form filed by that counsel and served on you."

and there are no appearance forms in Dr. Kearns' files for CAFC No. 95-1016 from which to obtain the address. It would be ironic and unfair to liberally construe the Federal Rules in favor of sophisticated attorneys while narrowly construing the same rules for a *pro se* litigant, as it appears was done here.

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[11] The CAFC dismissed Dr. Kearns' premature appeal of the 30 August 1994 order because Dr. Kearns had failed to serve AW&DC and RSSM his motion for reconsideration. The CAFC held that because they he had not served these non-parties, the appeal was untimely. Party, Chrysler Corporation, was served by Dr. Kearns.

THE PROCEDURE FOLLOWED BY THE COURT DID NOT MEET MINIMUM DUE PROCESS STANDARDS.

Lastly, assuming the District Court either incorrectly treated the moving papers as an interpleader or simply ignored the Fed. R. Civ. P. the procedures followed by the District Court did not meet the minimum due process standards under the law. Relief under Fed. R. Civ. P. Rule 60(b) (4) was sought from the District Court because the judgment is void. A judgment is void if a court acted in a manner inconsistent with due process of law. *Union Switch & Signal, supra.*

> "In an action for the enforcement of a lien, there should be a hearing on the issues of fact raised by the pleadings that is conducted under the rules governing trials generally." 51 Am Jur2d 200-201 § 74 Liens, *Garner* v. *Houston*, 323 S.W.2d 659, (Tex. Civ. App.).

In this regard, the assignment of the matter to a magistrate constituted error. Dr. Kearns did not consent to have the matter tried before a magistrate and the district court has no authority to refer the matter to a magistrate under Michigan law, the Federal Rules or under 28 U.S. Code § 636. The assignment of matter is contrary to Dr. Kearns' rights to have both the facts to establish the lien and amount of the lien conducted at a trial.

Moreover, the procedure followed by the magistrate was not a trial. Evidence was submitted by affidavit and briefs. Dr. Kearns never waived his rights to a trial.

CAFC denial of relief is specifically in conflict with the C.A. 11th Circuit.

Chrysler Corp.'s filing was improper because their suit, *Kearns* v. *Chrysler Corporation*, was over except for the limited purpose of executing the terms of the final judgment upheld by the Court of Appeals for the Federal Circuit with *certiorari denied* by the Supreme Court.

The action that occurred is specifically denied by the Eleventh Circuit,and not allowed by 28 U.S. Code § 1367 in

the light of the District Court's patent law limited jurisdiction under 28 U.S. Code § 1338(a). The District Court can not start-up ancil-lary or supplemental jurisdiction after it's final order has been upheld by the Supreme Court and the final judgment contains no provision for further action except to pay the whole amount to Dr. Robert W. Kearns.

There is nothing in the Final Judgment of 26 Oct '92 that authorizes the procedures followed by the District Court after the jurisdiction was transferred to the CAFC.

A Court does not have authority after a final judgment to take action not authorized by that final judgment. A District Court must execute the judgment as it is written, cannot act to modify the terms of the judgment, and, cannot act in some other manner not authorized by the judgment itself. It is improper for the District Court to do anything inconsistent with the denial of certiorari by the Supreme Court.

Both the Chrysler sureties Supersedeas Bond and the Final Judgment affirmed by the Court of Appeals for the Federal Circuit with certiorari denied by the Supreme Court require the sureties to pay the full amount, as it states on its face, to Dr. Robert W. Kearns.

The District Court had no jurisdiction beyond 29 June 1993

The District Court had no jurisdiction due to the operation of Fed. R. Civ. P. Rule 58 beyond Dr. Kearns' Notice of Appeal becoming effective on 29 June 1993. The District Court's final judgment was upheld by the CAFC and the Supreme Court.

Beyond 29 June '93, the papers filed in the District Court make no difference as its jurisdiction has passed to the CAFC and the Supreme Court.

For all the above reasons, therefore: the 30 August 1994 order; the District Court actions; the CAFC No. 95-1016 involving non-parties with no appearance, and/or 95-1334 actions

for non-parties with no appearance receiving § 284 Damages funds; and this Supreme Court action; is void inasmuch as it involves AW&DC, RSSM, Vincent L. Barker, Jr., KLH, P.C.'s Patrick A. Keenan and Daniel J. Henry, Jr., and Phyllis Kearns, either separately or as a group or sub-group.

The Final Judgment as adjudicated is to be carried out.

To correct all this requires that this Petition be granted so the power of supervision of the Supreme Court can be applied with knowledge and to save the public interest in the patent law.

More on the need to uphold
the public interest in patents

Otherwise, those who have to steal instead of invent will be left in charge of science and the useful arts, the U.S. trade deficit,. the interpretation of the U.S. Constitution, and the standard of living of the U.S. people under GATT for future generations.

The criminal docket priority is
holding up patent trials

NOTES FROM JUDICIAL CONFERENCE
Thursday, 9 May, 1991

Helen W. Nies, Chief Circuit Judge of the CAFC:

> p. 63: Judge Nies: [W]e are down in our filings on appeals from District Courts by 35 percent, a phenomenon we surmise or believe is caused by the overload of criminal cases in the District Courts, so that the Tucker Act cases and the Patent cases are put on the back burner and are not being tried."

Argument

Fed. R. Civ. P. Rule 60(b)(4) provides for relief from a judgment or an order if the judgment or order is void. A judgment or order is void if a court lacks jurisdiction over the subject matter. *U.S.* v. *Forma*, 42 F.3d 759, (2d Cir., 1994); *Watts* v. *Pickney*, 752 F.2d 406, 409 (9th Cir., 1985).

Dr. Kearns submits upon the filing of his Notice of Appeal the District Court was divested of jurisdiction to adjudicate the at-

torney's fee issue. Dr. Kearns' date of appeal was noted as 30 June 1993[12] see Docket Event entry #667.

The appeal of a case divests a district court of jurisdiction. *Williams* v. *Brooks*, 996 F.2d 728, 730 (5th Cir. 1993).

The Eleventh Circuit has specifically refrained from extending ancillary jurisdiction, as occurred here. *See, Scutieri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D. Fla. 1993).

The exercise of ancillary jurisdiction is improper for a number of reasons. First, since there is no jurisdiction there can be no ancillary jurisdiction.

> "Thus **when the court has jurisdiction of the principal action**, it may hear also any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that would normally determine jurisdiction." Wright, *Federal Courts* § 9 (4th ed. 1983). (**Emphasis** added.)

> "Cross-claims, impleader of third parties, interpleader, and intervention as of right are further examples of ancillary jurisdiction. Wright, *supra* § 9.

Thus, when the jurisdiction was transferred to the CAFC the District Court's ancillary jurisdiction was lost as well.

Second, in *Scuteri*, attorneys who had been discharged from a case attempted to impose a charging line under the Florida's law which recognizes equitable liens. The court recognized that

> "the final judgment entered in regard to the jury verdict on Plaintiffs' legal claims for damages has remained unchanged since 1989. As regards this portion of the case, this Court no longer has authority to alter the judgment."

to include the determination. *See, Scutieri, et al.*, 829 F.Supp. 387 (S.D. Fla., 1993).

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[12] The Notice of Appeal was actually received in the night box by the Court of Appeals for the Federal Circuit ("CAFC") on 29 June 1993. The date-stamp was misinterpreted. Fed. R. App. P. Rule 5 provides that when a Notice of Appeal is filed in the wrong court by mistake, the Notice of Appeal is nevertheless effective as of the date filed in the court of appeals.

Third, the claims of the attorneys are not ancillary to the cause of action in this matter, namely a patent infringement case. Under U.S. Code § 1367, the district courts were only given

> "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

Dr. Kearns has fee jury trials pending:
with counterclaims against RSSM; and,
with KLH, P.C.'s Patrick Keenan, et al.

The fee disputes between: Dr. Kearns and AW&DC; and, Dr. Kearns and RSSM are not so related as to be under the patent law limited § 1367. In fact, Dr. Kearns won a counterclaim against RSSM and is entitled to a jury case in both *William O. Bittman, et al.*, Plaintiff-Counterclaim Defendant v. *Robert W. Kearns*, Defendant-Counterclaim Plaintiff v. *Reed Smith Shaw & McClay*, Counterclaim Defendant, Civil Action No. 2:93-CV-74013, with jury demand before Honorable Avern Cohn in Detroit District Court, and in *Patrick A. Keenan, Daniel J. Henry, Jr., and KLH, P.C.*, a. Michigan Professional Corporation, Plaintiffs, v. *Robert W. Kearns*, Defendant, Civil Action No. 94-74753 with jury demand before Judge Taylor in the Detroit District Court.

Fourth, the District Court & CAFC may exercise some control over the parties and attorneys who are before it, but both RSSM and AW&DC withdrew their appearances some time before they moved the District Court & CAFC to award attorneys' fees.

Fifth, there is no diversity of citizenship jurisdiction between AW&DC and Dr. Kearns under 28 U.S. Code § 1332 and the Court has not invoked supplemental jurisdiction under 28 U.S. Code § 1367 by joinder or intervention.

MORE PERTINENT REASONS FOR GRANTING THE PETITION

The purchasing power of a U.S. $, the standard of living of the U.S. public, ... depend upon the U.S. of A. paying for the imports that standard of living requires. The U.S. merchandise

imports increased considerably to percent to $669 billion.[13] Meanwhile, merchandise exports rose by 10 percent to $503 billion. The shortfall was $166 billion in merchandise exports. But exports of services were $60.0 billion, so the net shortfall was $106 billion, on average, 8.8 billion per month. In Dr. Kearns' CAFC Appeal Appendix A36-A37 *The Washington Post* headline reads Quarterly Trade Deficit Hits 8-Year High. The net deficit in June, 1995 was $11.3 billion. A few days later, 21 August 1995 in an editorial entitled, "The Other Deficit", *The Washington Post* stated,

> "This country was the world's largest creditor 15 years ago, earning more than $30 billion a year on its foreign investments ... . But since then the United States has become the world's largest debtor ... .
> More important, the constant trade deficits are eroding the credit of the United States as the rest of the world judges it. ... . But the long-term trend for the dollar is still downward. Those trade deficits exert a constant pressure."

The U.S. bilateral merchandise trade deficits with Japan, China, Taiwan, Canada, and the European Union all widened. Japan and China together account for 54 percent of the total U.S. merchandise trade deficit.

U.S.-Japan trade relations centered in 1994 on bilateral negotiations conducted in the context of the "U.S.-Japan Framework for a New Economic Partnership" (the Framework Agreement). A priority sector was automotive industries. The Framework Agreement represented a heightened U.S. policy with an emphasis on attaining measurable results in the opening of markets. After the first few months of 1994, negotiations came to a standstill because of the unprecedented admission by the two countries' leaders that they were unable to find sufficient common

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[13] U.S. Dept. of Commerce, Bureau of the Census, "U.S. Merchandise Trade in Goods and Services, March 1995," U.S. Dept. of Commerce News, CB-95-96, FT-900 (95-03), May 18, 1995, exhibit 1, p. 4. These data are on a balance-of-payments basis, seasonally adjusted.

ground to proceed.

Congress took action. On 23 February 1994, Congressman Gephardt (D.-Mo.) and Senator Rockefeller (D.-W.Va.) co-sponsored the Fair Market Access Act of 1994. The proposed legislation would require the Commerce Department to set market access goals for competitive U.S. exports to use as targets under the section 301 provisions if an agreement with Japan were not reached within a year's time[14]. Senator Baucus (D. Mt) and Danforth (D.-Mo.) introduced legislation to reinstate "Super 301" on February 22, 1994 noting that it was aimed at Japan, *ibid*. On March 3, U.S. Trade Representative Michael Kantor announced that President Clinton had signed an Executive Order reinstating the Super 301 provision for a period of two years. On August 16, 1994, the U.S. and Japan signed an agreement aimed at ensuring U.S. inventors quicker processing of their patent applications and overall improved protection of U.S. intellectual property rights. Dr. Kearns had a new IWWS patent application published last month (August, '95) by the Japanese patent office for public 3-month criticism before issuing a Japanese patent office grant. At the end of September, 1994, the U.S. abandoned its demand that numerical targets be included in the agreement.[15]

The Korean auto market is the second-largest in Asia after that of Japan, and has been estimated to be the fastest growing auto market in the world. Korean industry forecasts 1994 sales at about 1.1 million units, up 12.1 percent over 1993. The Korean automobile market is virtually closed to imports; in 1993, 2,328 U.S.-made vehicles were sold in Korea. In 1994, U.S. automakers sold only 3,152 vehicles in Korea.

The Korean government, for example, discourages Korean con-

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[14] Susan MacKnight, "U.S.-Japan Economic Relations in 1994: A Look Back," *Japan Economic Institute*, Feb. 10, 1995, p. A3.

[15] Kazumori Ishiguro,"Too Much Pressure," *Look Japan*, Feb. 1995, p. 12.

sumers from buying automobiles with large engines for the stated reason of promoting energy conservation and reducing pollution[16]. Dr. Kearns' IWWS are controlled by a few low-power transistors and his moisture responsive IWWS save lives in wet weather. All Korean automobiles could use Dr. Kearns' IWWSs sub-assemblies. The market is not being developed by the U.S. automobile industry as they try to market only whole automobiles. The automobile assemblers world-wide infringe Dr. Kearns' U.S. & foreign patents, seemingly with the approval of the Judicial Branch and then the automobile assemblers exclude Kearns *Engineers* from supplier status in the U.S. that would provide him with the necessary economies of scale to keep the IWWS affordable. It is pertinent that Ford made an 80% profit of $700+ from stealing and Chrysler made an 82% profit of $550+ from stealing as well. Who says, unlawful conduct doesn't pay. What is the lesson our children learn from such trials results?

Current U.S. marketing efforts in Korea are concentrating on large autos (2-liter engines and above).

Meanwhile, as President Clinton was negotiating with the Japanese government, Dr. Kearns has had (Civil No. 85-70459 E.D.Mich. S.D., Judge Cohn) FUJI HEAVY INDUSTRIES, LTD. (Subaru), HONDA MOTOR CO., ISUZU MOTOR CO., LTD., MITSUBISHI MOTORS CORP., NISSAN MOTOR CO., LTD., TOYO KOGYO CO., LTD (Mazda), TOYOTA MOTOR CO., LTD. all in the Detroit U.S. District Court for patent infringement - and the cases against these giant Japanese auto firms are dismissed!

CONCLUSIONS

The Detroit District Court has allowed only Dr. Kearns' patents whose 'routine life' has expired to get to trial.

Inventors are entitled to their 'exclusive rights' for 'limited

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[16] Korea Development Institute, "Recent Economic Relations Between Korea and the U.S.," *Republic of Korea: Economic Bulletin*, July, 1994, p. 5.

times which is their Constitutional standard of compensation. The words, "from the date of this grant" in the patent grant from the U.S. Patent & Trademark Commissioner are unCongressional and unConstitutional.

The education of our youth and all people would be encouraged in the U.S., if Const. Art. I § 8 cl 8 was recognized as the specific mechanism, that it is in the Constitution, for the people to attain equal rights and opportunities.

Equitable Relief under 35 U.S. Code § 283 is mandatory to attain the public interest in the patent law and not simply Judicially discretionary.

The District Court's Order of 12 April '95 distributing the funds is void. Dr. Kearns' Complaint in the District Court for Maryland is released for action.

As is acknowledged in Japan, producing creative persons are 'national treasures', a level of esteem true in the U.S. too.

The Constitutional rights of inventors seeking a 'remedy' under 35 U.S. Code § 281 are due priority over the Amendment VI rights of criminals and are to have the assistance of counsel for their remedy.

It was an abuse of discretion by the Detroit District Court to require the jury to find wilfull infringement before equitable relief under 35 U.S. Code § 283 would be exercised.

Non-parties and those without an appearance under the local rules of the District Court have no standing before the CAFC as well, and their participation voids the orders of both the CAFC (Nos. 95-1016 & Nos. 95-1334) and those of 12 April '95 of the District Court.

Chrysler's sureties are not discharged from paying in full to Dr. Robert W. Kearns the supersedeas bond #5758926 executed 6 July 1993 and provided to Dr. Kearns under federal law.

Dr. Kearns has taken no money from the Court under the funds distribution Order of 12 Apr. '95, as money damages are not an adequate remedy in conformance with the decision in *Roche, supra*. GATT treaty *Article 46* is a proportional remedy.

APPENDIX

RECEIVED OCT 27 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT W. KEARNS,

Plaintiff,

v. Civil No. 82-70748

CHRYSLER CORPORATION,

Defendant.

_____/

FINAL JUDGMENT

This case came on for trial beginning October 16, 1991 before the Court and a jury, the Honorable Avern Cohn, United States District Judge presiding.

On November 22, 1991 the issue of whether plaintiff, Robert Kearns (Kearns), proved by a preponderance of the evidence that defendant Chrysler Corporation (Chrysler) infringed the following patent claims: U.S. Patent No. 3,351,836, claim 16; U.S. Patent No. 3,564,374, claim 3; U.S. Patent No. 3,602,790, claim 14; and U.S. Patent No. 3,581,178, claim 7, was submitted to the jury. On December 10, 1991 the jury returned a unanimous verdict in favor of Kearns. On April 28, 1992 the Court granted Chrysler's motion to set aside the verdict and directed entry of judgment in favor of Chrysler on U.S. Patent No. 3,581,178, claim 7.

On April 27, 1992 the issue of whether Kearns proved by clear and convincing evidence that Chrysler willfully infringed and what damages Kearns proved by a preponderance of the evidence was submitted to the same jury. On June 11, 1992 th jury returned a unanimous verdict that Kearns did not prove by clear and convincing evidence willful infringement by Chrysler and that Kearns proved damages in the form of a reasonably royalty, for the total of 12,563,107 infringing units produced by Chrysler during the time period from May 1977 to August 1988, of 90 cents per units. On JUne 11, 1992 a

judgment was entered in favor of Kearns and against Chrysler in the amount of $11,306,696.30. Thereafter the Court determined the remaining unresolved matters.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED in substitution for the judgments entered June 11, 1992 and July 31, 1992.

1. Chrysler infringed the U.S. Patent No. 3,351,836, claim 16; U.S. Patent No. 3,564,374, claim 3; and U.S. Patent No. 3,602,790, claim 14, during the period May 1977 to August 1988.
2. The number of infringing units is 12,563,107.
3. The damages suffered by Kearns in the form of a reasonably royalty is 90 cents per units.
4. Chrysler is indebted to Kearns in the amount of $11,306,696.30 for infringement.
5. Chrysler is indebted to Kearns in the amount of $8,075,193 for prejudgment interest and in the amount of $25,898.75 for costs taxed while Chrysler is entitled to a credit of $557,322.62 under the Order of August 27, 1992 making the total amount due Kearns under this final judgment $18,740,465.43.
6. All claims, prayers, requests, and motions for relief not specifically adjudged herein are denied and dismissed with prejudice.
7. Still pending is Chrysler's motion for a judgment as a matter of law or in the alternative for a new trial.

S/

AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: OCTOBER 26, 1992 AS OF JUNE 11, 1992
Detroit, Michigan

I hereby certify that the foregoing is a true copy of the original on file in this Office. CLERK U.S. DISTRICT COURT

A-2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRYSLER CORPORATION,

Plaintiff,

vs. Hon. Avern Cohn

Civil No. 82-70748

ARNOLD, WHITE & DURKEE CORP; VINCENT L. BARKER, JR.; PHYLLIS KEARNS; ROBERT W. KEARNS; KLH, P.C.; and REED, SMITH, SHAW & McCLAY, P.C.,

Defendants./

ORDER DIRECTING PAYMENT OF MONEY INTO THE COURT

At a session of said Court held
in the City of Detroit, County
of Wayne, State of Michigan,
on APR 03 1995
Present: Honorable Avern Cohn
U.S. District Court Judge

The Court having reviewed the Chrysler's Cross-Complaint and Third Party Complaint for interpleader, and the Court being of the opinion that the portion of Plaintiff's Complaint seeking permission to pay funds to the Clerk of the Court should be granted;

A-3

IT IS HEREBY ORDERED that Chrysler Corporation shall deposit into an interest bearing account with this Court the sum of $18,740,465.43 plus post-judgment as calculated on schedule A, representing the total Final Judgment in *Kearns* v. *Chrysler and American Motors Corporation* Case No. 82-70748. Subject to audit.

IT IS FURTHER ORDERED that Clerk of the Court shall deduct from such account any fee authorized by the Judicial Conference of the United States.

S/

U.S. District Court Judge

A TRUE COPY
CLERK U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY S/

DEPUTY CLERK

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHRYSLER CORPORATION,

Plaintiff,

vs.

Civil Action
No. 82-70748

ARNOLD, WHITE & DURKEE, CORP.; VINCENT L. BARKER, JR.; PHYLLIS KEARNS; ROBERT W. KEARNS; KLH, P.C.; and REED SMITH SHAW & McCLAY, P.C.,

Defendants
- - - - - - - - - - - - - - - - /

Proceedings had and testimony taken in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan on Wednesday, April 12, 1995.

"ORDER FOR DISTRIBUTION OF FUNDS DEPOSITED IN COURT

"After hearing regarding disbursements of the funds deposited in Court by Chrysler Corporation on April 4, 1995, in the amount of $21,077,300.82, in satisfaction of the Final Judgment against Chrysler Corporation entered October 29, 1992:

"IT IS ORDERED that the Clerk of this Court shall immediately disburse to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns shall designate, the amount of $10,400,000.00, together with interest earned on that amount since deposit, reduced by ten percent for authorized fees. The Interest earned shall be calculated by multiplying the total amount of interest earned in the account by the percentage equal to

$10,400,000.00 divided by

$21,077,300.82.

"IT IS FURTHER ORDERED that on May 3, 1995, the Clerk shall disburse the remainder of the account as follows:

"1. $1,040,000.00, together with interest earned on that amount since deposit reduced by ten percent for authorized fees, shall be delivered via check by the Clerk, payable to Phyllis J. Kearns, 18505 Grouse Lane, Gaithersburg, Maryland 20879.

"2. $103,188.78, together with interest earned on that amount since deposit reduced by ten percent for authorized fees, shall be delivered via check by the Clerk, payable to Vincent L. Barker, Jr., SSN: 3767-32-7636, 1130 Edison Plaza, Toledo, Ohio 43604.

"3. $156,047.39, together with interest at the rate of $48.16 per day since Aapril 12, 1995, until paid, shall be delivered via check by the Clerk, payable to KLH, P.C., FEIN: 38-

2478614, 24561 North River Road, Mr. Clemens, Michigan 48043.

"4. $1,853,219.90, together with interest earned on that amount since deposit reduced by ten percent for authorized fees, shall be delivered via check by the Clerk, payable to Reed, Smith, Shaw & McClay, FEIN: 25-0749630, 1200 18th Street N.W., Washington, D.C. 20036.

"5. $7,266,236.37, together with interest earned on that amount since deposit reduced by ten percent for authorized fees, shall be delivered via check by the Clerk, payable to Arnold, White & Durkee, FEIN 74-1658804, 750 Bering Drive, Houston, Texas 77057.

"IT IS FURTHER ORDERED that the interest applicable to the disbursements identified in Items 1, 2, 4 and f above, shall be calculated by multiplying the total itnerest earned and remaining in the fund by a percentage equal to the principal amount specified, divided by $10,677,300.82. The remaining value of the fund, after the above disbursements and after deducting any authorized fees, shall be divided, and ninety percent shall be disbursed by check payable to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns shall direct, and ten percent oof the remaining value shall be disbursed by check payable to Phyllis Kearns, 18505 Grouse Lane, Gaithersburg, Maryland 20879."

Any objection to the entry of that order?

DR. KEARNS: Yes, your Honor, I object.

THE COURT: Wait. Let's hear from Chrysler.

MR. HANSON: I'll be quick, your Honor.

Ms. Krasner points out to me that the actual date of the order, just for proficiencey, of the judgment is October 26th, 1992, not October 29th. That's what our documents show.

MR. DURKEE: It was signed on October 26th, it was entered

on October 29th.

MR. HANDON: And then, your Honor, the last point being, of course, we alredy objected to any disbursement of funds to dr. Kearns while the Maryland action is pending. I know the Court's view on it, but we simply offer a mormal motion for stay to the Court.

THE COURT: No stay.

MR. HANDON: I understand, your Honor. May I approach, just to file the stay?

THE COURT: Yes.

No stay.

MR. HANSON: Your Honor, we have no further objections, other than those stated.

THE COURT: Dr. Kearns, what's your objection?

DR. KEARNS: The title of my paper, your Honor, contains the words of my objections and my opposition. That is not an answer, even to the complaint. The time is still running to be able to answer, to submit to the Court an answer to the complaint.

MIne is not an answer to the complaint. I think it's improper to enter an order before the time runs to even answer the complaint.

THE COURT: Thank you.

Your motion is denied.

This case, today's hearing represents the culmination of fifteen years of litigation.

DR. KEARNS: Thirty two, your Honor, for all of my trials and tribulations with Chrysler. It was October of '63. ... .

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-1016

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

CHRYSLER CORPORATION,

Defendant,[1]

and

ARNOLD, WHITE & DURKEE CORPORATION,

Movant-Appellee,

and

REED SMITH SHAW & McCLAY,

Movant-Appellee.

ON MOTION

Before MICHEL, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and SCHALL, Circuit Judge.

MICHEL, Circuit Judge.

ORDER

Arnold, White & Durkee Corporation (AWD) and Reed Smith Shaw & McClay (Reed Smith) both more to dismiss Robert W. Kearns's appeal as untimely. AWD and Reed Smith state that Kearns opposes the motions and will file a response and that Chrysler takes no position and will not respond. Kearns has

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[1] The main portion of the Chrysler case was before this court in appeal no. 93-1450,-1470, which was decided on August 11, 1994. Still pending before the United States District Court for the Eastern District of Michigan at that time were ancillary issues concerning thelegal fees of Reed Smith Shaw & McClay (Reed Smith) and Arnold, White & Durkee Corporation (AWD). The district court has not entered an order granting legal fees to Reed Smith and AWD. Kearns appeals this order. Thus, Chrysler is not a party for purposes of this appeal. However, both Reed Smith and AWD have filed motions to dismiss this appeal.

Kearns's appeal as untimely. AWD and Reed Smith state that Kearns opposes the motions and will file a response and that Chrysler takes no position and will not respond. Kearns has not filed a response and moves for an extension of time to file his brief. Reed Smith opposes.

Briefly, AWD represented Kearns in his infringement case against Chrysler until shortly before trial. Kearns then dismissed AWD as counsel. Reed Smith represented Kearns in the liability phase of his trial against Chrysler. Reed Smith withdrew with the consent of the district court. AWD and Reed Smith then sought recovery of legal fees from Kearns. After reviewing a report and recommendation issued by the magistrate, the district court entered judgment granting legal fees to AWD and Reed Smith on August 30, 1994. On September 9, 1994, Kearns filed a Fed. R. Civ. P. 59(e) motion for reconsideration. The certificate of service showed that Kearns served Chrysler Corporation. However, he did not serve AWD or Reed Smith. The district court denied the Rule 59(e) motion on September 15, 1994. AWD and Reed Smith state that the district court's order was their first notice that a Rule 59(e) motion had been filed. Kearns filed a notice of appeal in this court on October 6, 1994.

AWD and Reed Smith seek dismissal on the ground that Kearns failed to serve them with his motion for reconsideration and, therfore, it was not a timely Rule 59(e) motion that tolled the time for appeal. Thus, AWD and Reed Smith maintain that Kearns's notice of appeal, filed more than 30 days after entry of judgment is untimely.

Rule 59(e) states that "[a] motion to alter or amend the judgment shall be serbved not later than 10 days after entry of the judgment." The timeliness of a Rule 59(e) motion "is deter-mined by thedate it is served, not by the date it is filed." Rivera v. M/T Fosarina, 840 F.2d 152, 154 (1st Cir. 1988) (citing Callahan v. Shultz, 783 F.2d 1543, 1546 (11th Cir. 1986) and Harcon Barge Co. v. D & G Boat Rentals, Inc., 784

F.2d 665, 668 (5th Cir.) (in banc), cert. denied, 479 U.S. 930 (1986).

Additionally, Fed. R. Civ. P. 5(a) provides, in pertinent part, that "every written motion . . . shall be served upon each of the parties" and that "[s]ervice upon the attorney or upon a party ;shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or p;arty at the attorney's or party's last known address ...." Alathough Kearns filed and served his Rule 59(e) motion on Chrysler within 10 days of the entry of judgment, it is evident from Kearns's certificate of service that he failed to serve the motion on AWD and Reed Smith. MOreover, Kearns knew which parties to serve in the case. For example, Kearns served other papers, namely his objection to the magistrate's report and recommendation and his notice of appeal, on all parties.

In Wilson Sporting Goods v. David Geoffrey & Assoc., 904 F.2d 677 (Fed. Cir. 1990), this court addressed the issue of the timeliness of a Fed. R. Civ. P. 50(b) motion that was served, but not filed, within "10 days after entry of judgment." Relying on a Sixth Circuit case involving similarly worded Fed. R. Civ. P. 52(b), we concluded that service of the motion was a critical element of the rule. Wilson, 904 F.2d at 682 (relying on Keohane v. Swarco, Inc., 320 F.2d 429 (6th cir. 1963)).

In Rivera, the First Circuit held that a Rule 59(e) motion that was filed but not served on the parties within 10 days of the entry of judgment did not toll the time for filing a notice of appeal. Rivera, 840 F.2d at 156. The other cases teach us that it is the date of service that is critical for determining whether a post-judgment motion had been timely made. Because Kearns failed to serve his Rule 59(e) motion on AWD and Reed Smith, the motion was not timely served and did not toll the time for filing a notice of appeal.

Thus, Kearns's notice of appeal, filed more than 30 days after judgment was entered, is untimely.

Accordingly,

IT IS ORDERED THAT:

(1) AWD's and Reed Smith's motions to dismiss appeal no. 95-1016 are granted.

(2) Kearns's motion for an extension of time to file his brief is moot.

(3) All sides shall bear their own costs.

(4) The revised official caption is reflected above.

FOR THE COURT

13 fEB 95
Date

s/
Paul R. Michel
Circuit Judge

cc: Robert W. Kearns
Bernard J. Casey, Esq.
William E. Matthews, Esq.

s9

Filed
U.S. Court of Appeals for
THE FEDERAL CIRCUIT
FEB 15 1995
FRANCIS X. GINDHART
Clerk

ISSUED AS A MANDATE: FEB 15 1995

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-1334

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

CHRYSLER MOTORS CORPORATION,

Defendant,

and

ARNOLD, WHITE & DURKEE CORPORATION,

Movant-Appellee,

and

REED SMITH SHAW AND MCCLAY, P.C.,

Movant-Appellee.

ON MOTION

Before MAYER, Circuit Judge.

ORDER

Upon consideration of Reed Smith Shaw and McClay, P.C.'s unopposed motion ;to dismiss Robert W. Kearns's appeal, and Arnold, White & Durkee Corporation's motion to dismiss that part of Kearns's appeal relating to it,

IT IS ORDERED THAT:

(1) Reed Smith's motion to dismiss is granted.

(2) Arnold, White & Durkee's motion to dismiss is granted.

(3) All parties shall bear their own costs.

JUN 28 1995
Date

S/
H. Robert Mayer
Circuit Judge

ISSUED AS A MANDATE: JUN 28 1995

cc: Robert H. Kearns

Bernard J. Casey, Esq.
William D. Durkee, Esq.

s11

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUN 28 1995
FRANCIS X. GINDHART
CLERK

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

95-1334

ROBERT W. KEARNS,

Plaintiff-Appellant,

v.

CHRYSLER MOTORS CORPORATION,

Defendant,

and

ARNOLD, WHITE & DURKEE CORPORATION,

Movant-Appellee,

and

REED SMITH SHAW AND MCCLAY, P.C.,

Movant-Appellee.

ON MOTION

Before MAYER, Circuit Judge.

ORDER

Upon consideration of Robert W. Kearns's motion for reconsideration and supplemental motion for reconsideration of the court's June 28, 1995 order dismissing his appeal,[2]

IT IS ORDERED THAT:

The motions for reconsideration are denied.

SEP 19 1995 s/

---

[2] Kearns's appeal no 95-1334 was dismissed pursuant to Reed Smith Shaw & McClay, P.C.'s and Arnold, White & Durkee Corpor-ation's unopposed motions to dismiss. Kearns asks that he be allowed to respond belatedly to those motions and that the court reconsider its dismissal in view of his arguments. We have consi-dered the arguments presented in Kearns's submission and find them to be not on point. Kearns is apparently seeking review of the merits of Arnold, White & Durkee and Reed Smith Shaw and McClay's entitlement to attorney fees, a matter encompassed by an earlier, dismissed appeal, not this appeal. Kearns presents no arguments relating to the merits of appeal no. 95-1334.

Date

H. Robert Mayer
Circuit Judge

cc: Robert H. Kearns
Bernard J. Casey, Esq.
William D. Durkee, Esq.

s11

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
SEP 19 1995
FRANCIS X. GINDHART
CLERK

Dear Reader:

The Court of Appeals for the Federal Circuit Opinion supporting the District Court's Final Judgment is located at 32 F.3d 1541 (1994).

A serious error by the CAFC is that Dr. Kearns' Kearns *Engineers* and Chrysler Corp.s Missile Division were the only two suppliers seeking the Chrysler-the-infringer market.

> "Frequently, the patent owner and infringer are the only suppliers in the market, and the owner is seeking to recover profits lost through every sale made by the infringer. *See, Water Technologies Corp.* v *Calco Ltd.*, 850 F.2d 660, 672, 7 USPQ2d at 1106; *Amster Corp.* v *Envirotech Corp.*, 823 F.2d 1538, 1543, 3 USPQ2d at 1065, 219 USPQ at 675. *In the two-supplier market*, it is reasonable to assume, provided the patent owner has the manufacturing and marketing capabilities, that it would have made the infringer's sales. *See, Del Mar Avionics, Inc.* v *Quinton Instrument Co.*, 836 F.2d 1320, 1327, 5 USPQ2d 1255, 1260 (Fed. Cir. 1987). (*Emphasis* added.) Where there are but two suppliers, the law assumes the inventor would obtain the business. The law is clear and well stated. *State Industries, Inc.* v *Mor-Flo Industries, Inc.*, 883 F.2d 1573 (Fed. Cir. 1989) [Thumb through, VOLUME THREE (of 3) of the 95-1334, and, the *Kearns* v. *Chrysler Corp. and American Motors Corp.* Appeal 93-1450,-1470 Appendixes for insight into Dr. Kearns' manufacturing experience and capabilities.]

A Congressional subcommittee study, *The Patent System and the Modern Economy*, includes the Congressional intent:

> "(T)he patent system provides a protected market with the opportunity for unusual profit necessary to justify the heavy investment in time, effort, and capital necessary to bring the improvement to the public. This same protected market provides an entering wedge by which a business enterprise entering a new field can overcome the obstacles that otherwise discourage entry into an industry already populated."Study No. 2 of the Subcom on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary, 84th Cong., 2d sess. (1957), page 5. Congressional Library Microfilm #11997.

CECILIA V. NOBEL, M.D.
1 MILL PLACE
SUITE 204
EASTON, MD 21601
410-822-6491

April 20, 1995

Supreme Court of the United States
Clerk Ruth Jones
1 First Street, N.E.
Washington, D.C.20543

In the Court of Appeals for the Federal Circuit

RE: Cases
94-1057 KEARNS v GM AND BROWNS BUICK
94-1303 KEARNS v CHRYSLER AND AMERICAN MOTORS
94-1305, -131 KEARNS v TOYOTA
94-1306 KEARNS v FERRARI
94-1307 KEARNS v WOODS & SWF
94-1308 KEARNS v FRED LAVERY PORSCHE
94-1310 KEARNS v UNITED TECHNOLOGIES
94-1311 KEARNS v BITTMAN
94-1313 KEARNS v AMERICAN ARBITRATION ASSOC.
94-1522 KEARNS v DAIMLER-BENZ
94-1016 KEARNS v CHRYSLER (4TH0

Dear Clerk Jones:

I had an appointment with Dr. Robert Kearns, this April 19, 1995 and am concerned about the signs of stress that he is exhibiting. It is my opinion that unless he can take a break from his grueling task of preparing so many papers for the court at once he will have an emotional breakdown.

I am writing to request that he be given what would amount to a medical leave of absence for two months as he has been appearing pro se since March 1992, and that his court cases appearances and work deadlines be extended for sixty days until June 19, 1995.

Sincerly yours,
S/
Cecilia V. Nobel, M.D.

cc: Robert W. Kearns

Honorable Avern Cohn
U.S. District Judge

Francis X. Gindhart
The Clerk of the Court
U.S. Court of Appeals
for the Federal Circuit

District Judge Hargrove
U.S. District Court
For the District of Maryland

CECILIA V. NOBEL, M.D.
1 MILL PLACE
SUITE 204
EASTON, MD 21601
410-822-6491

April 20, 1995

Francis X. Gindhart
The Clerk of the Court
U.S. Court of Appeals
for the Federal Circuit
National Courts Building
717 Madison Place, N.W.
Washington, D.C. 20439

RE: Cases
94-1057 KEARNS v GM AND BROWNS BUICK
94-1303 KEARNS v CHRYSLER AND AMERICAN MOTORS
94-1305, -131 KEARNS v TOYOTA
94-1306 KEARNS v FERRARI
94-1307 KEARNS v WOODS & SWF
94-1308 KEARNS v FRED LAVERY PORSCHE
94-1310 KEARNS v UNITED TECHNOLOGIES
94-1311 KEARNS v BITTMAN
94-1313 KEARNS v AMERICAN ARBITRATION ASSOC.
94-1522 KEARNS v DAIMLER-BENZ
94-1016 KEARNS v CHRYSLER (4TH0

Dear Clerk Gindhart:

I had an appointment with Dr. Robert Kearns, this April 19, 1995 and am concerned about the signs of stress that he is exhibiting. It is my opinion that unless he can take a break from his grueling task of preparing so many papers for the court at once he will have an emotional breakdown.

I am writing to request that he be given what would amount to a medical leave of absence for two months as he has been appearing pro se since March 1992, and that his court cases appearances and work deadlines be extended for sixty days until June 19, 1995.

Sincerly yours,

S/

Cecilia V. Nobel, M.D.

A-20

cc: Robert W. Kearns

Honorable Avern Cohn
U.S. District Judge

Supreme Court of the United States
Clerk Ruth Jones

District Judge Hargrove
U.S. District Court
For the District of Maryland

CECILIA V. NOBEL, M.D.
1 MILL PLACE
SUITE 204
EASTON, MD 21601
410-822-6491

April 20, 1995

Avern Cohn
U.S. District Judge
219 Federal Building
U.S. Court House
231 West Lafayette Street
Detroit, Michigan 48226

Attention: Clerk Cassidy

Dear Clerk Cassady:

I had an appointment with Dr. Robert Kearns, this April 19, 1995 and am concerned about the signs of stress that he is exhibiting. It is my opinion that unless he can take a break from his grueling task of preparing so many papers for the court at once he will have an emotional breakdown.

I am writing to request that he be given what would amount to a medical leave of absence for two months as he has been appearing pro se since March 1992, and that his court cases appearances and work deadlines be extended for sixty days until June 19, 1995.

Sincerly yours,
S/
Cecilia V. Nobel, M.D.

cc: Robert W. Kearns

Francis X. Gindhart
The Clerk of the Court
U.S. Court of Appeals
for the Federal Circuit

Supreme Court of the United States
Clerk Ruth Jones

District Judge Hargrove
U.S. District Court
For the District of Maryland

A-22

CECILIA V. NOBEL, M.D.
1 MILL PLACE
SUITE 204
EASTON, MD 21601
410-822-6491

April 20, 1995

District Judge Hargrove
U.S. District Court
For the District of Maryland
101 West Lombard Street
Baltimore, Maryland 21201

Re: Civil # HAR 95-938

Dear Judge Hargrove:

I had an appointment with Dr. Robert Kearns, this April 19, 1995 and am concerned about the signs of stress that he is exhibiting. It is my opinion that unless he can take a break from his grueling task of preparing so many papers for the court at once he will have an emotional breakdown.

I am writing to request that he be given what would amount to a medical leave of absence for two months as he has been appearing pro se since March 1992, and that his court cases appearances and work deadlines be extended for sixty days until June 19, 1995.

Sincerly yours,
S/
Cecilia V. Nobel, M.D.

cc: Robert W. Kearns

Honorable Avern Cohn
U.S. District Judge

Francis X. Gindhart
The Clerk of the Court
U.S. Court of Appeals
for the Federal Circuit

Supreme Court of the United States
Clerk Ruth Jones

Maureen R. Krasner, Esq.

CERTIFICATE OF SERVICE

I certify that on June 29, 1995, ***Appellee Arnold, White & Durkee's Motion to Dismiss Appeal With Respect to Arnold, White & Durkee*** was served via certified mail, return receipt requested, and first class mail on:

Dr. Robert W. Kearns
301 Houghton Lane
Queenstown, MD 21658

This document was first served on Dr. Kearns via federal express on June 21, 1995 for overnight delivery on June 22, 1995. It was returned to our offices on June 29, 1995 with a note that three delivery attempts had been made to his address, but no one would answer the door to accept delivery.

Veronique Harinam

G:\KEAE\001\MSC\COS.HAN

Supreme Court, U.S.
FILED
OCT 19 1995
CLERK

No. 95-508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. KEARNS,
Petitioner,
v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW and MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

RESPONDENT ARNOLD, WHITE & DURKEE'S MEMORANDUM OPPOSING CERTIORARI

WILLIAM D. DURKEE *
RICHARD L. STANLEY
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(713) 787-1400
Counsel for Respondent Arnold, White & Durkee

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-508

ROBERT W. KEARNS,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW and MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

RESPONDENT ARNOLD, WHITE & DURKEE'S MEMORANDUM OPPOSING CERTIORARI

Respondent Arnold, White & Durkee ("AW&D"), a Texas corporation, is a 120-attorney law firm with a national practice principally devoted to intellectual property litigation, including patents, trademarks, copyrights, and trade secrets.[1] The petitioner, Dr. Robert W. Kearns, is the inventor of several U.S. patents concerning intermittent windshield wiper control systems for automobiles, which have been the subject of protracted patent litigation between Dr. Kearns and nearly every automobile

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[1] Pursuant to S. Ct. R. 29.1, AW&D states that it has no parents, subsidiaries, or related companies.

manufacturer in the world. The first infringement action was filed in 1978 and every Kearns patent involved expired before September 1988. Dr. Kearns is currently proceeding *pro se*.

As shown herein, Dr. Kearns' latest petition presents no issues which can properly be resolved by this Court at the current procedural stage of the proceedings. AW&D submits that when the Court becomes aware of the relevant procedural facts pertaining to this petition, those facts alone will demonstrate that the petition should be denied.

STATEMENT OF THE CASE

AW&D served as counsel to Dr. Kearns in a bellwether case involving several of Dr. Kearns' intermittent windshield wiper control patents, *Kearns v. Ford Motor Co.*, Civil Act. No. 78-70740 (E.D. Mich.) ("the *Ford* case"). AW&D also served as counsel to Dr. Kearns in *Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich.) ("the *Chrysler* case"), until one week before the trial was scheduled. Dr. Kearns retained another law firm, Reed, Smith, Shaw & McClay ("RSS&M"), to represent him during the infringement portion of the latter trial against Chrysler, but discharged that firm after Chrysler's infringement was established. Dr. Kearns then appeared *pro se* during the subsequent damages trial in the *Chrysler* case.

This petition follows certain ancillary proceedings related to the *Chrysler* case. A jury trial in the *Chrysler* case resulted in an award of $18,740,465.43 in damages to Dr. Kearns. Pet. App. A-1. The district court's final judgment was the subject of separate appeals to the United States Court of Appeals for the Federal Circuit by both Dr. Kearns and Chrysler. After the district court's judgment was affirmed by the Federal Circuit, petitions for certiorari by both parties were denied. *Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich. Oct. 26, 1992), *aff'd*, 32 F.3d 1541 (Fed. Cir. 1994), *cert.*

denied, 115 S. Ct. 1392 (1995). Those proceedings concluded the merits litigation in the *Chrysler* case.

AW&D and RSS&M each moved independently to recover their attorneys' fees from Dr. Kearns. After the district court exercised ancillary jurisdiction over those claims and awarded fees in favor of the two law firms, Dr. Kearns separately appealed the district court's determination. That appeal was dismissed for lack of jurisdiction for having been filed more than thirty (30) days after the district court's final attorneys' fee judgment. Pet. App. A-9 (*Kearns v. Chrysler Corp.*, Civil No. 82-70748 (E.D. Mich. Aug. 26, 1994), *appeal dism'd*, No. 95-1016 (Fed. Cir. Feb. 13, 1995)) ("the attorneys' fee appeal"). No petition for certiorari was filed by Dr. Kearns following that dismissal and, to the extent that his current petition seeks to raise any issues pertaining to the propriety or amount of attorneys' fees awarded to AW&D or RSS&M as a result of those proceedings, such petition would be well out of time.

Chrysler then sought interpleader, declaratory and injunctive relief against Dr. Kearns, AW&D, RSS&M, and several others having asserted claims to the proceeds of the Final Judgment.[2] The district court granted such relief by allowing Chrysler to pay $21,077,300.82 into an interest-bearing account with the district court in full satisfaction of the Final Judgment, by allocating and directing payment of the proceeds to the appropriate claimants, and by enjoining further action against Chrysler based on the Final Judgment. Pet. App. A-3; Pet. App. A-5.

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[2] The other parties were Vincent L. Barker, Jr., who served as a Special Master in several of Dr. Kearns' patent litigations; KLH Corporation, a Michigan law firm and corporation that provided legal services to Dr. Kearns, and Phyllis Kearns, Dr. Kearns' ex-wife who claimed a share of the damages under a divorce decree. All of the parties had a claim against Dr. Kearns and the proceeds in accordance with final judgments of various federal or state courts.

Dr. Kearns then filed his third notice of appeal related to the *Chrysler* case, which was docketed by the Federal Circuit on May 9, 1995. RSS&M moved to dismiss the entire appeal on May 18, 1995. After the official caption of that appeal was amended on June 14, 1995 to correct the inadvertent omission of AW&D as a defendant-appellee, AW&D moved on June 21, 1995 to dismiss the appeal with respect to AW&D on grounds of *res judicata* because Dr. Kearns' appeal only raised issues as to AW&D that had already been decided in the proceedings that were the subject of his two prior appeals. Shortly thereafter, the Federal Circuit granted both motions and dismissed the appeal. Pet. App. A-13 (*Kearns v. Chrysler Motors Corp.*, No. 95-1334 (Fed. Cir. June 28, 1995)) ("the interpleader appeal").[3]

On July 10, 1995, Dr. Kearns filed his opening merits brief in Appeal No. 95-1334, even though the appeal had been dismissed two weeks prior. On July 28, 1995, Dr. Kearns filed a motion for reconsideration without seeking leave to do so, even though petitions for rehearing are to be filed within 14 days of the decision. *See* Fed. R. App. P. 40(a). On August 30, 1995, he filed another motion to permit his acts to be done out of time combined with another motion for reconsideration. On that same date, Dr. Kearns filed a reply brief, even though no opposition briefs had been filed by any party due to the dismissal of the appeal. On September 1, 1995, Dr. Kearns filed an appendix.

On September 19, 1995, the Federal Circuit denied Dr. Kearns' motion for reconsideration and his supplemental motion for reconsideration. Pet. App. A-15. On September 18, 1995, Dr. Kearns filed another application seeking a suspension of the rules by the Federal Circuit. On

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[3] The caption on the Federal Circuit's June 28th order was the caption applicable to Appeal No. 95-1016 rather than the amended caption issued by that court on June 14, 1995 for use in Appeal No. 95-1334. Pet. App. A-13.

October 2, 1995, the Clerk of the Federal Circuit returned his last set of submissions to him on grounds that repetitive motions for reconsideration are not considered by that court. This petition followed.

ARGUMENT

The majority of Dr. Kearns' petition attempts to raise questions that have long since been decided, and interpretations of judicial decisions and events that have long since been rejected by the District Court and by the Court of Appeals. Dr. Kearns can no longer get an injunction or other equitable relief related to the infringement of his patents, which had expired by 1988 or earlier. This case should not be prolonged by Dr. Kearns' unwillingness to accept that finality.

Whether Dr. Kearns recognizes or agrees with the prior decisions and results is wholly irrelevant, the judicial process is now over with respect to the merits patent litigation and to the ancillary payment and fee disputes. Indeed, Dr. Kearns has already petitioned this Court on the patent merits issues and the time for a petition on his appeal from the ancillary fees issues has long since expired.

The only aspect of the proceedings related to the *Chrysler* case that can possibly be addressed by this petition is the Federal Circuit's dismissal of Dr. Kearns' latest appeal (No. 95-1334) of the district court's grant of Chrysler's supplemental request for interpleader relief. That action did nothing more than distribute funds that were paid by Chrysler to satisfy its adverse judgment in the infringement litigation to various claimants (including the respondents here) in accordance with prior judicial determinations by both federal and state courts.

The district court's underlying interpleader decision and distribution of the funds paid by Chrysler into the District Court was reasonable, fair, and correct. Judge Cohn of the United States District Court for the Eastern Dis-

trict of Michigan presided over all of Dr. Kearns' patent litigations, and was intimately familiar with Chrysler's desire to satisfy its adverse judgment and with the events and circumstances of Dr. Kearns' litigation, Dr. Kearns' behavior, and the role of each of the respondents in the ultimate outcome. No even arguable basis has been shown to alter the District Court's allocation of the deposited funds according to the prior final judicial awards.

Moreover, the Federal Circuit's dismissal of Dr. Kearns' appeal from that decision was itself correct and proper, and did not even implicate the merits of the District Court's decision. In its denial of Dr. Kearns' motion for reconsideration, the Court of Appeals observed:

> We have considered the arguments presented in Kearns's submission and find them to be not on point. Kearns is apparently seeking review of the merits of Arnold, White & Durkee and Reed Smith Shaw and McClay's entitlement to attorney fees, a matter encompassed by an earlier, dismissed appeal, not this appeal. Kearns presents no arguments relating to the merits of appeal no. 95-1334.

Pet. App. A-15 n.2. As before the Court of Appeals, Dr. Kearns does not address the merits of the interpleader orders in his petition; he just repeats his views as to the prior final judgments on the patent merits issues and on the fee awards.

CONCLUSION

There is no reason for this Court to grant certiorari to review the propriety of the Federal Circuit's dismissal in this particular case, which can have no effect on any persons or legal doctrine apart from momentarily reinstating Dr. Kearns' meritless and misfocused appeal. In turn, that appeal could only affect the distribution of funds to the proper claimants based on prior final judicial determinations. Because review of the Federal Circuit's dismissal is clearly not warranted by this Court, Dr. Kearns' petition should be denied.[4]

Respectfully submitted,

WILLIAM D. DURKEE *
RICHARD L. STANLEY
ARNOLD, WHITE & DURKEE
750 Bering Drive
Suite 400
Houston, Texas 77057
(713) 787-1400
Counsel for Respondent
Arnold, White & Durkee

* Counsel of Record

[4] In light of the above procedural history of the case, AW&D does not believe that any additional information or citation of authority is necessary to dispose of Dr. Kearns' latest petition. If the Court wishes any additional briefing in opposition, AW&D will promptly provide it at the Court's direction.

(3)

No. 95-508

Supreme Court, U.S.
FILED
OCT 26 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ROBERT W. KEARNS,
Petitioner,

v.

CHRYSLER MOTORS CORPORATION; AMERICAN MOTORS CORPORATION; KLH, PROFESSIONAL CORPORATION; REED SMITH SHAW & McCLAY; ARNOLD, WHITE & DURKEE, CORPORATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

RESPONDENT REED SMITH SHAW & McCLAY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BERNARD J. CASEY
REED SMITH SHAW & McCLAY
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QUESTIONS PRESENTED FOR REVIEW

Respondent Reed Smith rejects the questions presented for review in the Petition for Writ of Certiorari because they raise issues that have already been decided and are thus barred by *res judicata* or that are untimely or unsuitable to be decided by this honorable Court.*

---

* Reed Smith believes that the procedural history itself is a sufficient basis upon which the Court may decide this Petition for Writ of Certiorari. However, Reed Smith will promptly submit any additional briefing in opposition that the Court finds necessary.

PARTIES

Respondent Reed Smith Shaw & McClay ("Reed Smith") is a Pennsylvania partnership with approximately 360 attorneys and offices in seven cities. Reed Smith was counsel to Petitioner in the liability portion of a patent infringement action brought by him against the Chrysler Corporation in the Eastern District of Michigan before the Honorable Judge Avern Cohn. Thereafter, Reed Smith engaged in ancillary litigation with Petitioner to recover attorneys' fees and expenses associated with its representation of Petitioner in the Chrysler action.

Petitioner Dr. Robert W. Kearns ("Dr. Kearns") is an inventor who held several patents related to intermittent windshield wiper control systems. These patents have been the underlying subject of patent infringement litigation and lengthy associated proceedings brought by Dr. Kearns against several automobile manufacturers, including the Chrysler action in which Reed Smith represented him. Dr. Kearns has also fought efforts by Reed Smith and others, including Arnold, White and Durkee ("AW&D"), to collect fees and expenses associated with these lawsuits. Dr. Kearns is currently proceeding *pro se*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-508

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION; AMERICAN MOTORS CORPORATION; KLH, PROFESSIONAL CORPORATION; REED SMITH SHAW & McCLAY; ARNOLD, WHITE & DURKEE, CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

RESPONDENT REED SMITH SHAW & McCLAY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Dr. Kearns has cited a number of "questions" for review in his Petition for Writ of Certiorari. Respondent submits, however, that Dr. Kearns' latest petition does not present any issues which can be resolved by this Court at the current procedural stage of the litigation. A review of this procedural history demonstrates that this Petition for Writ of Certiorari should be denied.

1. Dr. Kearns' Patent Infringement Action Against Chrysler

Dr. Kearns filed a patent infringement action against Chrysler in the Eastern District of Michigan (*Robert W.*

Kearns v. Chrysler Corporation, et al., No. 82-70748, E.D. Mich.) which resulted in a jury verdict in his favor and Final Judgment entered by U.S. District Judge Avern Cohn on October 26, 1992 against Chrysler in the amount of $18,740,465.43. Pet. App. A-1. Chrysler appealed and Dr. Kearns filed a cross-appeal to the Court of Appeals for the Federal Circuit. On August 11, 1994, the Federal Circuit affirmed the Final Judgment and rejected Dr. Kearns' cross-appeal. (*Robert W. Kearns v. Chrysler Corporation*, 32 F.3d 1541 (Fed. Cir. 1994)). This Court denied Chrysler's Petition for Writ of Certiorari on March 20, 1995. *Chrysler Corporation v. Kearns*, 115 S. Ct. 1392 (1995). Dr. Kearns also filed a petition for certiorari which this Court denied on March 20, 1995. *Kearns v. Chrysler*, 115 S. Ct. 1393 (1995).

2. Attorneys' Fees Litigation Against Dr. Kearns

Reed Smith served as counsel to Dr. Kearns through the completion of the liability phase of his patent infringement trial against Chrysler in the Eastern District of Michigan. With the consent of the court, Reed Smith withdrew from that case after the jury had entered findings of liability against Chrysler. Arnold White & Durkee ("AW&D") had been counsel to Dr. Kearns in the Chrysler action prior to the time that Dr. Kearns dismissed them and replaced them with Reed Smith. After the Chrysler verdict, both AW&D and Reed Smith filed separate claims against Dr. Kearns to recover attorneys' fees and expenses incidental to their respective representations.

At Judge Cohn's direction, Reed Smith filed an application for recovery of attorneys' fees, expenses, interest and a performance bonus with the court in the Eastern District of Michigan on September 23, 1993. After a hearing before a magistrate on Reed Smith's and AW&D's applications, Judge Cohn entered an order dated August 26, 1994 that awarded attorneys' fees and expenses in specified amounts to the law firms. ("Final Fee Or-

der") Resp. App. 1a. The district court denied Dr. Kearns' motion for reconsideration of the Final Fee Order on September 14, 1994.

Dr. Kearns appealed the Final Fee Order to the Court of Appeals for the Federal Circuit. On February 15, 1995, pursuant to motions to dismiss filed by Reed Smith and AW&D, the court of appeals dismissed Dr. Kearns' appeal because it was untimely filed. Pet. App. A-9.

3. Chrysler's Interpleader Action

Following the denial by this Court on March 20, 1995 of the Petitions for Writ of Certiorari in the underlying *Chrysler* case, Chrysler filed an interpleader action with the court in the Eastern District of Michigan seeking, *inter alia*, directions on the distribution of the money judgment awarded to Dr. Kearns. On April 3, 1995, the district court entered an Order directing Chrysler to deposit the money judgment with the court ("Order Directing Payment"). Pet. App. A-3.

On April 12, 1995, after a hearing at which Dr. Kearns and other interested parties were permitted to express their views on the distribution of the Final Judgment, Judge Cohn signed an Order for Distribution of Funds Deposited in Court ("Order for Distribution"). This Order called for immediate payment to Dr. Kearns of his portion of the judgment and for distribution of the remainder of the judgment to the other interested parties, including Reed Smith and AW&D, on May 3, 1995. Resp. App. 4a.

On April 27, 1995, Judge Cohn denied two motions for reconsideration and a motion to stay which Dr. Kearns filed in connection with the court's Order Directing Payment and Order for Distribution ("the Distribution Orders").

Dr. Kearns then appealed the Distribution Orders to the Court of Appeals for the Federal Circuit. On June

28, 1995, pursuant to motions of Reed Smith and AW&D, the Federal Circuit dismissed those appeals. Pet. App. A-13. Thereafter, Dr. Kearns filed with the Federal Circuit a series of submissions in the nature of motions for reconsideration. On September 19, 1995, the Court of Appeals for the Federal Circuit denied those motions. Pet. App. A-15. This Petition for Writ of Certiorari followed.

ARGUMENT

The various "questions" raised by Dr. Kearns' latest Petition for Writ of Certiorari relate to matters decided in all three of the procedural stages outlined in the previous section. First, Dr. Kearns' "questions" relate to the merits of his patent infringement action against the Chrysler Corporation. Second, they relate to the rulings of the district court regarding the attorneys' fees disputes between Dr. Kearns and the law firms which represented him in the *Chrysler* case. Finally, they relate to rulings of the district court regarding the interpleader action filed by Chrysler seeking direction for the distribution of the money judgment awarded to Dr. Kearns in the underlying patent infringement action.

With regard to the first set of issues, the merits of the patent infringement action against Chrysler were litigated extensively and finally disposed of with the issuance by this Court on March 20, 1995 of the orders denying Chrysler's and Dr. Kearns' Petitions for Writ of Certiorari. Therefore, any issues raised in Dr. Kearns' pending petition that directly relate to the merits of the patent infringement case of *Kearns v. Chrysler*, including the appropriate and available relief in such an action, are barred from further review by *res judicata*.

Second, issues which might pertain to the merits of the fee dispute are untimely for purposes of review under a Writ of Certiorari. The petition was not filed until September 26, 1995, long after the Federal Circuit dismissed the appeal pertaining to the merits of the fee dis-

pute on February 15, 1995. Therefore, any issues relating to the lower court's disposition of attorneys' fees disputes, including entitlement to the fees and their amounts, are untimely and should not be considered by this Court.

The only issues raised in the pending Petition for Writ of Certiorari which are even arguably timely are those which relate to the lower court's Distribution Orders arising from Chrysler's interpleader action. However, such orders were nothing more than executions of the Final Judgment and Final Fee Order which Dr. Kearns had already appealed and lost. The Distribution Orders did not depart in any way from the Final Judgment or the Final Fee Order. They were simply procedural orders by which Judge Cohn facilitated the distribution of the Final Judgment to Reed Smith and the other interested parties who had a claim on the judgment. The Distribution Orders did not present any questions independent of those which had already been decided on the merits. Therefore, they raise no serious questions warranting review by this Court.

CONCLUSION

For the reasons stated above, Reed Smith respectfully requests this honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 82-70748

ROBERT W. KEARNS,
Plaintiff,

v.

CHRYSLER CORPORATION,
Defendant.

ORDER ON APPLICATIONS FOR ATTORNEY FEES

On February 10, 1994 a magistrate judge filed a report and recommendation relating to the attorney fee claim of Arnold, White and Durkee Corporation (AWD) in this patent case. On July 19, 1994, the magistrate judge filed a second report and recommendation relating to the attorney fee claim of AWD and the attorney fee claim of Reed, Smith, Shaw and McClay (RSSM). Both reports recommend that AWD and RSSM receive attorney fees for plaintiff's successes at trial for reasons and in amounts described by the magistrate judge. AWD has filed objections asserting (1) its right to a proportional share of the prejudgment interest part of the judgment in favor of plaintiff; (2) that an award of expenses to Kearns should be excluded from the amount of attorney fees to which it is entitled; and (3) that it should not be charged for a credit to defendant for plaintiff's sanctioned conduct. Plaintiff has filed a paper styled Plaintiff Kearns' Objection To Magistrate Morgan's Report And Recommenda-

tion. The paper does not conform to the rules for objections and review as described in the closing paragraphs of the reports and recommendations and, therefore, will not be considered by the Court.

Accordingly, there being no proper response to the objections of AWD and no objections to the reports and recommendations except as noted, the findings and conclusions of the Reports And Recommendations filed February 10, 1994 and July 19, 1994 are adopted by the Court as its findings and conclusions except that AWD shall (1) be entitled to a proportional share of the prejudgment interest awarded plaintiff; (2) not receive a proportional amount of the expenses awarded plaintiff; and (3) not be charged a proportional share of the credit to defendant for plaintiff's sanctioned conduct.

The amounts of the fees awarded are described in Exhibit A.

Payment to AWD is subject to payment of the judgment by defendant.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
United States District Judge

DATED: Aug. 26, 1994
Detroit, Michigan

EXHIBIT A

A. Arnold, White and Durkee—$6,460,629.76 plus post-judgment interest thereon from June 11, 1992.

B. Reed, Smith, Shaw and McClay—$970,055.11 plus interest at 6% from January 7, 1992, together with a performance bonus of $565,000 plus interest at 6% from January 7, 1992. Payment of the performance bonus is subject to payment of the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Avern Cohn
Civil No. 82-70748

ROBERT W. KEARNS,
Plaintiff,

vs.

CHRYSLER CORPORATION,
and
Defendant;

ARNOLD WHITE & DURKEE CORPORATION;
REED SMITH SHAW & MCCLAY,
Movants.

ORDER FOR DISTRUBITION OF FUNDS
DEPOSITED IN COURT

After hearing regarding disbursements of the funds deposited in Court by Chrysler Corporation on April 4, 1995, in the amount of $21,077,300.82, in satisfaction of the Final Judgment against Chrlysler Corporation entered October 24, 1992;

IT IS ORDERED that the Clerk of this Court shall immediately disburse to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns should designate, the amount of $10,400,000.00, together with interest earned on that amount since deposit, reduced by 10% for authorized fees. The interest earned shall be calculated by multiplying the total amount of interest earned in the account by the percentage equal to $10,400,000.00 divided by $21,077,300.82.

IT IS FURTHER ORDERED that on May 3, 1995, the Clerk shall disburse the remainder of the account as follows:

1. $1,040,000.00, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Phyllis J. Kearns, 18505 Grouse Lane, Gathersburg, Maryland 20879.

2. $103,188.78, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Vincent L. Barker, Jr., SSN: 376-32-7636, 1130 Edison Plaza, Toledo, Ohio 43604.

3. $156,047.39, together with interest at the rate of $48.16 per day since April 12, 1995, until paid, shall be delivered via check by the Clerk, payable to KLH, P.C., FEIN: 38-2478614, 24561 North River Road, Mt. Clemens, Michigan 48043.

4. $1,853,219.90, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Reed, Smith, Shaw & McClay, FEIN: 25-0749630, 1200 18th Street N.W., Washington, D.C. 20036.

5. $7,266,236.37, together with interest earned on that amount since deposit reduced by ten (10%) percent for authorized fees, shall be delivered via check by the Clerk, payable to Arnold, White & Durkee, FEIN 74-1658804, 750 Bering Drive, Houston, Texas 77057.

IT IS FURTHER ORDERED that the interest applicable to the disbursements identified in Items 1, 2, 4 and 5 above, shall be calculated by multiplying the total interest earned and remaining in the fund by a percentage equal to the principal amount specified, divided by $10,677,300.82. The remaining value of the fund, after the above disbursements and after deducting any author-

ized fees, shall be divided, and ninety (90%) percent shall be disbursed by check payable to ROBERT W. KEARNS, SSN: 370-22-8932, 2350 Bering Drive, #124, Houston, Texas 77057, or such other address as Kearns should designate and ten (10%) percent of the remaining value shall be disbursed by check payable to Phyllis J. Kearns, 18505 Grouse Lane, Gathersburg, Maryland 20879.

/s/ Avern Cohn
U.S. District Judge

Supreme Court, U.S.
FILED
NOV 2 1995
CLERK

No. 95-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,
KLH, PROFESSIONAL CORPORATION,
REED, SMITH, SHAW AND MCCLAY, P.C.,
ARNOLD, WHITE & DURKEE, CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF TO ARNOLD, WHITE & DURKEE CORPORATION'S OPPOSITION TO CERTIORARI

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Kearns v. *Chrysler Corp., et al*, 32 F.3d 1541 (Fed. Cir. 1994)

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Shank v. *Lippman* (1931), 253 Mich. 451, 235 N.W. 216. 7

Wipfler v. *Warren* (1910), 163 Mich. 189, 194, 128 N.W. 178; 7

Arguments first raised in the Brief in Opposition

p. 1: "protracted patent litigation"

Meaning Kearns would not settle all his remaining infringement cases after *Ford* for money, under his contingency agreement, as AW&DC insisted he do - saying Dr. Kearns and the public were not entitled to equitable relief under 35 U.S. Code § 283. Moreover, to settle would mean Dr. Kearns giving up:

1) his Constitutional standard of compensation for his 21 U.S. IWWS patents ,namely, the Art. I § 8 cl 8: "securing for limited times to ... inventors the exclusive right to their ... discoveries;"
2) his manufacturing plant (see CAFC Appendix Vol. 3);
3) his fellow citizens jobs in expanding USA foreign trade.

p. 2: "every Kearns patent involved expired before September 1988."

(See Reply Brief appendix [Reply A-1] from the sixth infringement chart Dr. Kearns submitted to the District Court officials identifying General Motors Corp.'s infringement of his U.S. patents.) The facts of the 'routine life' of the '936, '603, '698 and '059 are:

3,796,936 Windshield Wiper Control Device
Filed: Dec. 15, '72
Issued: Mar. 12, '74
'routine life' expires: **Mar. 11, '91**

3,728,603 Windshield Wiper Control
Filed: Oct. 27, '70
Issued: Apr. 17, '73
'routine life' expires: **Apr. 16, '90**

4,339,698 Control Apparatus for Windshield Wiper System
Filed: Apr. 12, '79
Issued: Jul. 13, '82
'routine life' expires: **Jul. 12, '99**

4,494,059 Structure for and Method of Surface Condition Sensing and Indicating and Motor Speed Control
Filed: Jan. 9, '80
Issued: Jan. 15, '85
'routine life' expires: **Jan. 14, '02**

Thus, AW&DC's statement "expired before September 1988" in support of denying this Petition is **not true** as the four patents against GM demonstrate. AW&DC emphasize that Dr. Kearns is proceeding *pro se*. In contrast former Chief Circuit

Judge Howard T. Markey of the Court of Appeals for the Federal Circuit wrote to Dr. Kearns' son, Dennis [Reply A-2]:

> "Congratulations on your recent victory in the United States Supreme Court. A *Pro Se* triumph in our land's highest court is a rare event and in itself a historic event. Having worked hard to return the patent law to following the statute, the result is heart-warming. I look forward to visiting with both of you in the future."

The recommendation of Dr. Kearns' doctoral Professor Mergler [Reply A-3] is also germane.

Arguments first raised in the Brief in Opposition

STATEMENT OF THE CASE

p. 2: AW&D served as counsel to Dr. Kearns in a bellwether case ..."

The *Ford* case was not a "bellwether" case as seen by the extensive infringement by GM in [Reply A-4]. Dr. Kearns required additional drawings from GM to go beyond this sixth chart of GM infringement to reduce the number of claims at trial. The District Court dismissed *Kearns* v. *GM*. The supervision of the Supreme Court is required for equity on equity and to learn of the deficiencies in the Fed. R. Civ. P. which lead to the punishment of the inventor of a successful product such as the Intermittent Windshield Wiper System ("IWWS").

p. 2: "until one week before trial"

Dr. Kearns was forced to discharge AW&DC as they were prepared to sign a Pretrial Order which did not contain a claim for equitable relief under 35 U.S. Code § 283 to secure a remedy for himself and the public under 35 U.S. Code § 281.

p. 2: "discharged that firm"

The record shows that RSSM withdrew over Dr. Kearns' objections and after Dr. Kearns agreed to the $500,000 deposit proffered by the District Court to have RSSM finish the case. After RSSM voluntarily withdrew, Dr. Kearns conducted the damages phase trial *pro se* and the jury awarded three times the $/infringement of *Ford*.

p. 2: "This petition follows certain ancillary proceedings" says AW&DC!"

For the District Court to be said by the Opposition to have conducted "ancillary proceedings" is to confirm the need for Dr. Kearns' Petition to this Supreme Court to be granted. For the District Court to have conducted "ancillary proceedings" it is required that the District Court have jurisdiction of the principal case. Wright, *Federal Courts*, § 9 (4th ed. 1983); *Scuteri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D. Fla. 1993). "Cross-claims, impleader of third parties, interpleader, and intervention as of right are further examples of ancillary jurisdiction (requiring jurisdiction of the principal case). Wright, *supra* § 9. Without jurisdiction and intervention, ancillary jurisdiction does not exist, *Fulton National Bank of Atlanta* v. *Hozier*, 267 U.S. 276, 280 (1925). Intervention is also a requirement that the District Court failed. *Fulton*, *supra*, requires both for jurisdiction. The lack of intervention is discussed herein at p. 8.

From the Overview (Pet. p. 1), it can be readily seen that jurisdiction was transferred to the CAFC on 29 June '93 and from the CAFC jurisdiction was passed to the Supreme Court. Thus, the proceedings identified as "ancillary" were not ancillary at all due to lack of jurisdiction of the principal case which had passed to the CAFC and from there passed on to the Supreme Court. The "ancillary" proceedings discussed by AW&DC in their Brief in Opposition are exactly the actions that are not permissible in Federal Courts under the District Court's condition at the time and are now appealed by Dr. Kearns to the Supreme Court. *See*, [Pet. p. 25].

Upon the Supreme Court acting there was nothing for the District Court to do but carry out the mandate of the Supreme

Court[1] which was to comply with the District Court's Final Judgment of 28 October 1992 which confirmed pay all the Supersedeas Bond amount to Dr. Robert W. Kearns. As Dr. Kearns concludes in his Petition on p. 30:

> "The District Court's Order of 12 April '95 distributing the funds is void. Dr. Kearns' Complaint to the District Court for Maryland is released for action."

p. 3: "Those proceedings concluded the merits litigation in the Chrysler case."

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[1] See Docket Event 752 of April 17, '95 (but note not ANSWER!) ROBERT KEARNS' OBJECTIONS & OPPOSITION TO CHRYSLER'S CROSS-COMPLAINT AND THIRD PARTY COMPLAINT FOR INTERPLEADER, DECLARATORY AND INJUNCTIVE RELIEF

[T]his Court does not have personal jurisdiction of the parties in this case. ... Chrysler Corp. has not filed a separate action to seek its relief. Chrysler Corp.'s present filing was improper because their suit, *Kearns* v. *Chrysler Corporation*, is over except for the limited purpose of executing the terms of the final judgment upheld by the Court of Appeals for the Federal Circuit with *certiorari denied* by the Supreme Court. ... 2. A Court does not have authority after a final judgment to take action not authorized by that final judgment. A Court must execute the judgment as it is written, cannot act to modify the terms of the judgment, and, cannot act in some other manner not authorized by the judgment itself. Both the Supersedeas Bond and the Final Judgment affirmed by the Court of Appeals for the Federal Circuit with certiorari denied by the Supreme Court require Chrysler Corp. to pay the full amount to Robert W. Kearns. 3. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Jewelers Vigilance Committee, Inc.* v. *Ullenberg Corp.*, 853 F.2d 888 (Fed. Cir. 1988) citing at n. 3 *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948) (quoted with approval in *Northern Helex Co.* v. *United States*, 634 F.2d 557, 560, 225 Ct.Cl. 194 (1980). Under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction only from *final* decisions of the United States District Courts. A Judgment is final for purposes of appeal when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *Donovan* v. *Hayden Stone, Inc.*, 434 F.2d 619, 620 (6th Cir., 1970) citing *Heike* v. *United States*, 217 U.S. 423, 429, 30 S.Ct. 539, 54 L.ed. 821; *St. Louis, Iron Mountain & S. R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28, 2 S.Ct. 6, 27 L.Ed. 638; *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir.).

Not so. The CAFC admitted the Chrysler action had matters pending at that time:

> "The main portion of the Chrysler case was before this court (CAFC) in appeal no. 93-1450, -1470, which was decided on August 11, 1994. Still pending before the United States District Court for the Eastern District of Michigan at that time were ...[2]."

A proceeding eligible for adjudication was Docket Event #652 entered on 16 June '93, — Dr. Kearns' GATT Uruguay Round paper. The District Court momentarily said, no jurisdiction, (Docket Event #653) during the day of 29 June '93. The no jurisdiction was not appealable at that time since the jurisdiction of the Judiciary was not final as Congress had not yet decided to enter the GATT Treaty under consideration.

The CAFC did not have jurisdiction over the appeal of Dr. Kearns' GATT Uruguay Round paper in 1994 either as the CAFC has jurisdiction under 28 U.S.C. § 1295 only of **final** decisions and the decision by Congress whether to enter the GATT Treaty was not final until 1995.

In transmitting the proposed GATT Treaty legislation to Congress on 27 September 1994, President Clinton said[3],

> "The leaders of every major industialized nation have pledged to take action so that the Uruguay Round Agreements can be implemented by January 1, 1995."

That date was met.

As the record shows, Chrysler's own actions kept the *Kearns* v. *Chrysler Corp. and American Motors Corp.* Civil Action No. 82-70748 continuing. That Chrysler overt action was the filing by Chrysler, under Civil Action No. 82-70748, its Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief.

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[2]See footnote 1 of O R D E R in CAFC No. 95-1016 Pet. A-9.

[3]House Document 103-316, Vol. 1 p. (1) 103d Congress, 2d Session.

AW&DC admit in their Opposition p. 5:

> "The only aspect of the proceedings related to the *Chrysler* case that can possibly be addressed by this petition is the Federal Circuit's dismissal of Dr. Kearns' latest appeal (No. 95-1334) of the district court's grant of Chrysler's supplemental request for interpleader relief."

But those 'proceedings ... for interpleader relief' kept the Civil No. 82-70748 time open into 1995 wherein the GATT Treaty became effective U.S. law. Thus, AW&DC admit the Judicial *time* of Civil Action No. 82-70748 was extended for the Judiciary to consider Dr. Kearns' GATT Uruguay Round paper filed during the time before jurisdiction was passed to the appellate courts. The jurisdiction of the Judiciary over the GATT Treaty is now **final** and eligible for appellate relief.

p. 3: "AW&D and RSS&M each moved independently to recover their attorneys' fees from Dr. Kearns."

RSSM filed an independent action complaint in the U.S. District Court for the District of Columbia (Washington) before District Judge Norma Holloway Johnson, Civil Action No. 92-0501, a jury trial, in which Dr. Kearns was granted a specific counter-claim against RSSM to be heard by a jury. That case was transferred to Detroit's District Judge Cohn, Civil Action No. 2:93-CV-74013 where it is still pending.

See, Pet. pp. xi & 26.

AW&DC appealed the dismissal with prejudice of their attorneys' fees motion in ¶ 6 of the Final Judgment, see Overview Pet. p. 2, (Docket Event #662) which appeal (#93-1468) was dismissed by the CAFC (Docket Event #683). While AW&DC have received $6.5 million of the $10.7 disbursed to others, patent law is Federal law. Federal law is to use the law of the State in which the action occurred. Here the action occurred in Detroit, Michigan. In Michigan, there is no statutory law governing attorneys' liens, so they rest entirely upon the common law. *Bruce* v. *U.S.*, 1955, 127 F.Supp. 858. Dr.

Kearns discharged AW&DC prior to their planned meeting to sign a Pretrial Order with Chrysler lawyers that did not contain his claim for equitable relief under 35 U.S. Code § 283 and sought only money damages under 35 U.S. Code § 284. Michigan law is given in *Ambrose* v. *Detroit Edison*, 237 N.W.2d 520, 524 (C.A. Mich. 1975)

> 'The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risk the payment of double contingent fees equal to the greater portion of any amount eventually recovered. ... The uncertain position of the client in such circumstances is illustrated by the record in the present case where the trial court found the discharge was without cause and this court has made a contrary finding and concluded the discharge was justified. Unless a rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence.' We agree with the reasoning and adopt the rule here, that "trial court improperly impressed lien for contingent fee percentage rather than for quantum meruit of services rendered." Remanded.

Returning to the situation of RSSM to apply Michigan law even though the pending case including Dr. Kearns' counterclaim is dominant. Michigan law applicable to RSSM is given in *Miles* v. *Krainik*, 167 N.W.2d 479 (C.A. Mich., 1969) where there is cited with approval:

> "The law creates the lien of an attorney upon the judgment or fund resulting from his services. *Wipfler* v. *Warren* (1910), 163 Mich. 189, 194, 128 N.W. 178; *Shank* v. *Lippman* (1931), 253 Mich. 451, 235 N.W. 216.

In the RSSM situation, they voluntarily withdrew after Dr. Kearns agreed to meet the $500,000 deposit proffered by District Court Cohn for RSSM to complete the damage phase

of the trial. Dr. Kearns, *pro se*, years later secured the money fund now disbursed. Thus under Michigan Law RSSM have no lien upon the fund. An attorney who withdraws from a suit without cause loses his inchoate right to a lien on the ultimate recovery. *Ambrose* v. *Detroit Edison Co.*, 1975, 237 N.W.2d 520 (C.A. Mich. 1975).

p. 3: "That appeal (CAFC No. 95-1016) was dismissed ..."

Article III limits the role of the federal courts to adjudication of actual "cases" and "controversies." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Standing is one element of the case or controversy requirement, *id.*, and a requirement for appellate jurisdiction. From Dr. Kearns' Overview (Pet. p. 1) AW&DC appealed the dismissal of their claim to the CAFC (Docket Event #662) which was subsequently dismissed by the CAFC (Docket Event #683). RSSM did not appeal the dismissal of their 'notice' of charging lien (Docket Event #465), nor did Phyllis Kearns appeal her 'claim' (Docket Event #171). AW&DC's and RSSM's Notice of Appearance, under the local rules became ineffective. KLH, P.C., Phyllis Kearns, and Vincent Barker never filed Notice of Appearance. Thus AW&DC, RSSM, KLH, P.C., Vincent Barker and Phyllis Kearns lack standing before the court. To acquire standing, the procedure is to use Fed. R. Civ. P. Rule 24. None of these entities sought to intervene. The entities lack standing. The District Court lacked jurisdiction beyond 29 June '93 as seen in the Overview. Without jurisdiction and intervention, ancillary jurisdiction does not exist, *Fulton National Bank of Atlanta* v. *Hozier*, 267 U.S. 276, 280 (1925) so the cases and controversy requirement of Const. Article III were not met which is a requirement for the distribution of funds in the non-ancillary proceeding held without District Court jurisdiction. Dr. Kearns' GATT Uruguay paper meets Art. III.

CAFC appeal No. 95-1016, is void *ab initio* and has no effect

on this Petition as those not served therein had no standing. The Argument section is covered by the law already cited. No jurisdiction, no parties, no intervention, outside Michigan law, are adequate reasons p. 6: "to alter the District Court's allocation of the deposited funds."

Arguments first raised in the Brief in Opposition

CONCLUSION

p. 7: The issues raised do not effect a large number of litigants;

p.5: The proceedings were "reasonable, fair, and correct";

p. 7: The appeal was "meritless and misfocused."

The issues of parties and jurisdiction have a considerable effect on all litigants and particularly those inventors who are encouraged by 28 U.S. Code § 1654 to appear *pro se* in their technical cases which now cost, on average, $3.5 million. Trial lawyers acquire 'conflicts' and usually are not trained in technical graduate schools. Entities steal the inventions inventors work to manufacture, and when seen on the market other entities steal "to meet the competition." Are Dr. Kearns' successful invention acts — resulting in 43 defendants - to be "promoted" under Art. I § 8 cl 8 or "punished" with multiple trials? Do the Fed. R. Civ. P. address this problem — particularly when the 'life' of the "limited times" are not recognized by the Court and criminal cases are given priority? The Court's lack of examination of the issues raised by Kearns directly effect every inventor and further reverberate as job loss throughout American society. The Court has an opportunity in this Petition to examine and reflect upon the respective value of innovation and the obligation of the federal judicial system to secure[4] and protect those rights in 35 U.S. C. § 281

---

[4] securing is a Constitutional requirement Art. I § 8 cl 8.

civil actions that are to end in a 'remedy' for patent infringement. Is money a 'remedy' for stealing patented inventions? If so, why doesn't 35 U.S.C. contain a compulsory license section as does the Canada patent system? The answer is that Congress rejected a compulsory license section in the patent law twice. [Pet. pp. Hearings at xi & 8.] Rather than addressing the merits of the issues presented by Kearns, AW&DC asserts, conclusively in p. 5, that the results were "reasonable, fair, and correct" in defense of: abandoning its ethical obligation to zealously represent Kearns; litigating against its former client; and following a dubious judicial path to $6.5 million for itself. AW&DC cites no authority to justify the District Court and CAFC practices — including departures from Michigan law. Because federal courts are of limited jurisdiction, not only parties but the court itself has a duty, responsibility and obligation to independently confirm its authority.

Thus, Dr. Kearns' Petition for Writ of Certiorari should go forward in keeping with the words of Harry H. Wellington, Sterling Professor of Law at Yale Law School[5]:

> "I assert what the Court at times seems to deny; not only do other institutions, groups and individuals interpret the Constitution, but sometimes they have an obligation to contest both the Court's readings and its authoritativeness. While this obligation is being discharged, we have noisy dialogue. I see this as necessary. The consequences of dialogue helps fit the regulation that results from adjudication into the democratic ideology that we profess as a nation."

---

[5] *Interpreting the Constitution*, 'The Supreme Court and the Process of Adjudication,' by Harry H. Wellington from the Contemporary Law Series, Yale University Press, New Haven & London.

GM INFRINGES CLAIMS:

Kearns \ GM	GM10007 Delco #1	GM10008 Delco #2	GM10015 Delco #3	Trial Candidate?	VALID?
'836	1	1			
	12	12			
	14	14		14	14
		15			
	16*	16*	16*	16*	16
'374	1				
	2				
	3				
	4				
	6*				
	7			6*	6
		7			
		8			
		9			
		10			
	11	11		11	1
		12			
		13			
		14			
		15			
		16			
		17			
'747	16	16	16	16	16
'178	1	1	1		
	2	2			
	3	3	3		
	4	4	4		
	5	5			
	6*	6*	6*	6*	6
	7	7	7		
'790			14*	14*	14
'936	1	1?	1	1	1
'090	Is it true, there are no non-depressed park IWWSs for GM?				
'603	1	1		1	1
'698	4	4	4	4	4
	6	6	6	6	6
'159	1	1			
	2	2			
	3	3		3	3
'059			10	10	

THE JOHN MARSHALL LAW SCHOOL
315 South Plymouth Court Chicago, Illinois 60604
Telephone: 312-427-2737 Facsimile: 427-8307

OFFICE OF THE DEAN

April 5, 1995

Mr. Dennis M. Kearns
The Phoenix Group
300 E. Maple, Suite 270
Birmingham, MI 48009

Dear Mr. Kearns:

I was pleased to have met you and your father, Robert, at the Lemelson event at the Smithsonian last week.

Congratulations on your recent victory in the United States Supreme Court. A Pro Se triumph in our land's highest court is a rare event and in itself a historic event. Having worked hard to return the patent law to following the statute, the result is heart-warming. I look forward to visiting with both of you in the future.

Sincerely,

S./

Howard T. Markey
Dean Emeritus

HTM:m

CASE WESTERN RESERVE UNIVERSITY

3 April 1993

Dean James F. Forsyth
Assistant Dean for Admission and
Registration
University of Maryland School of Law
500 West Baltimore Street
Baltimore, MD 21201-1786

Dear Dean Forsyth:

I write to support the application for admission to the University of Maryland School of Law of Dr. Robert W. Kearns. I have written hundreds of letters with varying degrees of enthusiasm for my undergraduate and graduate students during my thirty-five years at Case. **This letter is the most important endorsement I have ever written!**

Robert Kearns was my Ph.D. student at Case Institute of Technology (now Case-Western Reserve University) from January 1961 until June 1964. He came to Case following nine years experience as a researcher at the Bendix Research Laboratories and as a faculty member in the School of Engineering of Wayne State University. His research was extremely creative, productive, and executed with a self-directed maturity not usually found in the typically-younger graduate student.

I have fifty-six of my graduate Ph.D. students in major research institutions such as Bell Laboratories, IBM, Hewlett-Packard and at major universities such as MIT, Harvard, Stanford, Cal Tech, and Berkley. I place Robert Kearns at the very top of this group of outstanding professionals

for he not only has the intellectual powers of the very best, but in addition he has a profound sense of mission and unswerving dedication to his personal moral code.

Robert Kearns' reasons for attending law school go far beyond his personal experiences with the courts and the U.S. patent system; he has experienced the paid, the frustration, the inequity, and finally the victory of his principles and he genuinely wants to gain the knowledge and credentials to permit him to help rectify the legal deficiencies that have hurt him and others so gravely.

I give him my highest recommendation for admission to your School of Law.

Sincerely,

S./

H.W. Mergler
Leonard Case Professor of
Electrical Engineering, Emeritus

Department of Electrical Engineering and Applied Physics

Supreme Court, U.S.
F I L E D
NOV 13 1995
CLERK

No. 95-508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. KEARNS,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
AMERICAN MOTORS CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF TO REED SMITH SHAW & McCLAY'S OPPOSITION TO CERTIORARI

ROBERT W. KEARNS, PH.D.
Manufacturing-Inventor
Petitioner pro se
301 Houghton Laboratory Lane
Queenstown, Maryland 21658
(410) 827-9337

BEST AVAILABLE COPY

Reply to Reed Smith's

QUESTIONS PRESENTED FOR REVIEW

p. i: Reed Smith rejects the questions presented for review ... because they raise issues ... that are untimely or unsuitable to be decided by this honorable Court.

Reed Smith overlooked the fact that the civil action no. 82-70748 was continuing in time during the distribution-of Chrysler's-funds phase that followed the decision on certiorari by the Supreme Court.

See, Overview p. 1 Pet.. to learn the timeliness.

Both Petitioner, Robert W. Kearns' ("Dr. Kearns'") Motion-

> to Yet Allow Evidence to Grant Dr. Kearns Equitable Relief to Bring Judgment into Accord with the USA's Postion Under the General Agreement of Tariffs and Trade in the Uruguay Round ("GATT"), Docket Event #652 entered on 16 June 1993-

and the District Court's ORDER — no jurisdiction in the premises — were entered before Dr. Kearns' Notice of Appeal was filed with a Court of Appeals. Dr. Kearns could not appeal said Order, because it was not a final order — both the U.S. Congress and the President were still considering whether to sign the GATT Treaty. That Order remained non-final until 8 June 1995 when the patent law portion of the GATT Treaty became effective U.S. law.

Dr. Kearns pursuit of equitable relief under 35 U.S. Code § 283 has become, next to saving his soul, the dominant goal of his life after he first read *Roche Prods., Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858, 221 U.S.P.Q. 937 (Fed. Cir. 1984) and came to understand that the public interest in the U.S. patent law was not fulfilled in a 35 U.S. Code § 281 'remedy' civil action,— as said 'remedy' was to the patentee — not the public —, *unless* equitable relief under 35 U.S. Code § 283 was recognized by the Supreme Court to be mandatory to the patentee.

Damages alone, under 35 U.S. Code § 284, are nothing more than a compulsory license that defeats the 'remedy.'

That compulsory license is unConstitutional whether it results from a formal infringement trial proceeding, as here, or the authorization is direct. For money alone, through a 'remedy' trial process, Chrysler *et al.* has been given the authority to utilize the patent property of Dr. Kearns. That is wrong! Art. I § 8 cl 8 has been perverted. The public interest was denied. The inventor-manufacturer was denied. Our trade and economy were denied. Wet-weather driving safety was not enhanced by the sales of the 35 U.S. Code § 112 'best mode' disclosure.

Moreover, the USA Judicial Branch enforces a single time period of 17 years which is unConstitutional as the law allows multiple time periods of exclusivity — that need not start with the first day of the grant. In the case of this Petition, Ford and Chrysler were infringing Dr. Kearns' patents on the first day of the grant. How is it possible to give the inventor an exclusive right when others are infringing ["using", *see*, *Roche*, *supra*] it?

It is a blessing that the GATT Treaty is liberally sprinkled with the phrase, "unless this would be contrary to existing constitutional requirements." That presents an opportunity for the Justices to 'remedy' our export trade deficit now, but only now, as the GATT Treaty is new and a denial of the Petition will accept our diminished position as being in conformity with the existing words of our Constitution.

Good results are fairly contained in the questions presented. These are important and special reasons for granting certiorari.

Reply to Reed Smith's
PARTIES

p. ii & Cover: Reed Smith was counsel to Petitioner in the liability portion of a patent infringement action brought by him against the Chrysler Corporation ... .

In accord with the intent of Supreme Court Rule 14.1.(b) (and the admonition of the Supreme Court admittance Clerk) Dr. Kearns has corrected the cover hereon to list only the parties to these proceedings. Thus, KLH, Professional Corporation; Arnold, White and Durkee, Corporation and Reed Smith Shaw & McClay, P.C. have been removed from the cover hereon. The proceedings in the Court of Appeals for the Federal Circuit ("CAFC") occurred without their credentials as parties being checked by the Circuit Judge. Using motions —

> "AWD and Reed Smith seek dismissal on the ground that Kearns failed to serve them with his motion for reconsideration and, therefore, it was not a timely Rule 59(e) motion that tolled the time for appeal."[Pet. A-10]

was without legitimacy. See, Pet. p. 17 (reproduced for convenience):

"The Florida Court has questioned the dismissed (RSSM) or fired (AW&DC) lawyer's right to assert a motion in the case they have left. Like the lawyers in *Scuteri, et al., supra*, RSSM and AW&DC lawyers

> "sole basis for appearing in this case is that it represented Plaintiffs several years ago. There is no question that (they) are not a party." "

The Rules of the Fed. R. Civ. P., including **Rule 5. Service and Filing of Pleadings and Other Papers**, apply to parties. Thus, Dr. Kearns' conduct in CAFC Appeal No. 95-1016 [Pet. A-9] of serving Chrysler Corporation (as American Motors Corp. is now owned by Chrysler Corp.) was in accord with the Fed. R. Civ. P. Rules. Dr. Kearns' not serving non-parties is not a proper basis for employing *res juricata* of phases of this

Petition for Writ of Certiorari.

The legal foundation for CAFC O R D E R in Appeal No. 95-1334 dated 28 June 1995 [Pet. A-13 & A-15] is faulty from their non-party-in-the-action status. In view of the judicial events occurring in deference to AW&DC's and Reed Smith's non-party-status urgings upon the CAFC, Dr. Kearns' *pro se* status makes his number (8) Question Presented most relevant to the Constitutional treatment of inventors by the Judiciary. Presently, *pro se* inventors are only entitled to have their pleadings liberally construed. *Haines* v. *Kerner*, 404 U.S. 519 (1972).

p. ii: "Dr. Kearns has also fought efforts by Reed Smith and others, including Arnold, White and Durkee ("AW&D") to collect fees and expenses associated with these lawsuits. Dr. Kearns is currently proceeding *pro se*."

It is true. It is true that Petitioner Dr. Kearns is a Professional Engineer Registered in both Mechanical and Electrical Engineer and inventor of 29 U.S. patents and granted 'many' foreign patents throughout the western world is appearing *pro se* under 28 U.S. Code § 1654. It is also true, that when William O. Bittman, *et al.* filed a Complaint against Dr. Kearns in the U.S. District Court for Columbia in Washington, Dr. Kearns defended himself and his honor. Moreover, that dispute is currently, Civil No. 2:93-CV-74013, a jury trial, in which Dr. Kearns has a counterclaim against Reed Smith and is to proceed in the Detroit U.S. District Court presided over by District Judge Cohn.

The Justices of the Supreme Court know that the Constitution Art. I § 8 cl 8 is directed toward 'promoting' science and the useful arts and that is not happening when a District Judge 'walks away from a jury trial in which Dr. Kearns has a counterclaim' and shovels Chrysler money to Reed Smith and others.

What troubles Dr. Kearns as well about this, is that the Court of Appeals for the Federal Circuit ("CAFC")[1], on a record consisting of but a few pieces of paper, has so far sanctioned, departures and the CAFC itself departed from the accepted and usual course of judicial proceedings that an exercise of this Court's power of supervision is in order, if the USA Government that issues patents is to pay any attention to Galileo's second remark[2], that if he were granted and protected by a privilege:

> "I shall the more attentively apply myself to new inventions for universal benefit."

In 1594, the Doge, on behalf of the government, used the expression "privilege" as the Venetian name for a patent.

In short, Reed Smith is saying they are happy to receive $3 million in by-passing court procedures when they have no standing, did not intervene, are not parties, abandoned their client who agreed to Judge Cohn's proffer of placing with the Court $500,000 to assure Reed Smith of payment to complete the damage phase of the Chrysler trial. But they voluntarily withdrew and went home.

---

[1] remember, the CAFC is now the USA's only Court of Appeals for U.S. patents in the nation. (Absolute power ... .)

[2] *KETTERING AWARD ADDRESS* by Circuit Judge Giles S. Rich, republished in the Journal of the Patent Office Society, Vol. 46, p. 855 (1964). {Dr. Kearns filed his first Intermittent Windshield Wiper System patent in 1964.}

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM O. BITTMAN, et al.,]
Plaintiffs,]
Counterclaim Defendants,]
v] Civil Action No.
] 2:93-CV-74013
ROBERT W. KEARNS,] Honorable Avern Cohn
Defendant,]
Counterclaim Plaintiff,]
v]
REED SMITH, et al.,]
Counterclaim Defendant.]
] 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICK A. KEENAN;]
DANIEL J. HENRY, JR.;]
and KLH, P.C.,]
a Michigan Professional Corporation]
Plaintiffs,] Case No.94-74753
vs.] Judge Taylor
ROBERT W. KEARNS,]
Defendant.]

Presently, in CAFC Appeal No. 95-1481. 6

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Fed. R. Civ. P.

defenses under Rule 12

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the leader be made by motion:
(1) lack of jurisdiction over the subject matter,
(2) lack or jurisdiction over the person,
(3) improper venue,
(4) insufficiency of process;
(5) insufficiency of service of process,
(6) failure to state a claim upon which relief can be granted,
(7) failure to join a party under Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the leading are presented to and not excluded by the court, the motion shall be treated as one ;for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. 8

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Rule 54. Judgments; Costs

(a) Definition; Form.
(b) Judgment Upon Multiple Claims or Involving Multiple Parties.
(c) Demand for Judgment.
(d) Costs; Attorneys' Fees.
(1) Costs Other than Attorneys' Fees.
(2) Attorneys' Fees. 4

Rule 59. New Trials; Amendment of Judgments

(a) Grounds.
(b) Time of Motion.
(c) Time for Serving Affidavits.
(d) On Initiative of Court.
(e) Motion to Alter or Amend a Judgment. 7

Rule 60. Relief From Judgment or Order

(a) Clerical Mistakes.
(b) Mistakes; Inadvertence; Excusable Neglect; Newly Di8scovered Evidence; Fraud, etc. 7

Laws:

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 8

"The Congress shall have the power:

"To promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 10

Article III

Section. 1.
Section. 2.
Section. 3. 7

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Laws (Con't.):

Public interest in the patent law: 2

In early times:

Pennock v. *Dialogue*,
2 Pet. 1;

Kendall v. *Winsor*,
21 How. 322, 329;

Adams v. *Burke*,
17 Wall. 453;

Motion-Picture Co. v.
Universal Film Co.
243 U.S. pp. 510-511;

Morton Salt Co. v. *G.S. Suppiger Co.*,
314 U.S. 488, 493;

United States v. *Masonite Corp.*,
316 U.S. 265, 278

... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..." the Supreme Court extols that the public interest in the patent law is dominant. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665.

In the '80s,

The Supreme Court exclaims the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohn and Haas Co.*, 448 U.S. 176, 221.

Page

Statutes:

28 U.S. Code:

§ 636. Jurisdiction, powers, and temporary assignment
(of U.S. magistrates). 8

§ 1291. Final decisions of district courts
The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decision of the district courts of the United States, ... 3

§ 1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit
(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—
(1) of an appeal from a final decision of a district court of the United States ... 2

§ 1332. Diversity of citizenship; amount in controversy; costs.
(a) The district courts shall have original jurisdiction of all civil actions; where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
(1) citizens of different States; 6

Page

Statutes:

35 U.S. Code:

§ 112. Specification

The specificaion shall contain a written description of the invention ..., and shall set forth the best mode contemplated by the inventor of carrying out his/her invention.

§ 154. Contents and term of patent

Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification and drawings for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

(July 19, 1952, c. 950, section 1, 66 Stat. 804) 10

§ 281. Remedy for infringement of patent

A patentee shall have remedy by civil action for infringement of his patent.

July 19, 1952, c. 950, § 1, 66 Stat. 812. 1, 3, 10

§ 283. Injunction.[1]

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 1

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[1] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189, 26 L.Ed. 975.

Page

Statutes (Con't.):

35 U.S. Code:

§ 284. Damages.

(a) Upon a finding for the claimant the court shall award the claimant damages

1. adequate to compensate for the infringement,
2. but in no event less than a reasonable royalty for the use made of the invention by the infringer,
3. together with interest and costs as fixed by the court.

(b) When the damages are not found by a jury, the court shall assess them.

(c) In either event the court may increase the damages up to three times the amount found or assessed. 2, 4

Newspapers:

Quarterly Trade Deficit Hits 8-Year High, by John M. Berry, The Washington Post, 18 August 1995; 3

The Other Deficit, an Editorial, The Washington Post, 21 August 1995. 3

Speeches:

Galileo's remarks[2]

KETTERING AWARD ADDRESS by Circuit Judge Giles S. Rich, republished in the Journal of the Patent Office Society, Vol. 46, p. 855 (1964). 4

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[2] {Dr. Kearns filed his first Intermittent Windshield Wiper System patent in 1964.}

Page

Treaties:

General Agreement on Tariffs and Trade ("GATT")

(proposed)

On 20 December 1991, Arthur Dunkel, GATT Director General & the Chairman of the Trade Negotiations Committee tabled the document, a Protocol, titled, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" [MTN-TNC/S/FA Dec. 20, 1991] The document purports to be "a concrete and comprehensive representation of the final global package of the results of the Uruguay Round." *See*, TRADE-BASED APPROACHES to the PROTECTION of INTELLECTUAL PROPERTY by Edward Slavko Yambrusic Oceana Publications, Inc. (1992)
New York * London * Rome 6

(legislated)

URUGUAY ROUND TRADE AGREEMENTS,
TEXTS OF AGREEMENTS,
IMPLEMENTING BILL,
STATEMENT OF ADMINISTRATIVE ACTION,
and
REQUIRED SUPPORTING STATEMENTS
Message from the President of the United States
September 27, 1994.—Message and accompanying papers referred to the Committees of Ways and Means, Agriculture, Educatin and Labor, Energy and Commerce, Foreign Affairs, Government Operations, the Judiciary, and Rules and ordered to be printed.
House Document 103-316, Vol. 1
H.R. 5110 103d Congress, 2d Session
Available from Government Printing Office
(Sept.,1994) 6

Dr. Kearns' Replies to Reed Smith's STATEMENT OF THE CASE

p. 1: Dr. Kearns' latest petition does not present any issues which can be resolved by this Court at the current procedural stage of the litigation. A review of this procedural history demonstrates that this Petition for Writ of Certiorari should be denied.

In the Overview on p. 1 of Dr. Kearns' STATEMENT OF THE CASE, the scene of Docket Event #652 is: that Judge Cohn has consistently denied, both in *Kearns* v. *Ford* and thus far in *Kearns* v. *Chrysler Corp. and American Motors Corp.* an evidentiary hearing at which Dr. Kearns can present evidence of his— *and the public's* —entitlement to equitable relief under 35 U.S. Code § 283[3]; the window of opportunity is still open at that time as no one has yet appealed the Final Judgment. It is then that Dr. Kearns moves the Court, "to yet allow evidence [to be heard] to grant Dr. Kearns equitable Relief to bring the Final Judgment into accord with the USA's [present] Position in the Uruguay Round of discussions under the proposed Treaty of General Agreement on Tariffs and Trade ("GATT")." Dr. Kearns knew[4] of GATT early.

Judge Cohn issued an ORDER [Docket Event #653] that he had no jurisdiction on the premises of Dr. Kearns' Motion.

Dr. Kearns could not appeal that ORDER as it pertained to a 35 U.S. Code § 281 patent case and the CAFC's authority to review the District Court's ORDER under 28 U.S. Code §

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[3] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189.

[4] On 20 December 1991, Arthur Dunkel, GATT Director General & the Chairman of the Trade Negotiations Committee tabled the document, a Protocol, titled, "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations" [MTN-TNC/S/FA Dec. 20, 1991] The document purports to be "a concrete and comprehensive representation of the final global package of the results of the Uruguay Round." [*Id.*] And, Dr. Kearns studied a copy he obtained.

1295 was limited in (a)(1) to "final decisions of a district court of the United States" and a treaty draft in 1993 is not 'final.' Nor could Dr. Kearns appeal in 1994 as the GATT Treaty was not 'final.'

Certiorari was denied for CAFC Appeals Nos. 93-1450,-1470 on 17 March 1995. The record shows Chrysler then sought to this date to distribute Chrysler funds deposited with the Court by continuing civil no. 82-70748. On 8 June 1995, the GATT patent law became effective USA law[5].

Dr. Kearns was the first inventor-lawyer(?) to question the Constitutionality of the GATT Treaty provisions under Art. I § 8 cl 8 in Docket Event #652 entered on 16 June 1993.

Moreover, it is to the benefit: of the public interest in the patent law[6]; of the economy and foreign trade of the USA[7];

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[5] *See*, GATT Treaty is now effective U.S. Law on p. 3 of Dr. Kearns' Petition for Writ of Certiorari and the arguments made therein. CAFC Appeal No. 95-1334 Appendix Vol. 2 contains documents beginning: at A4, Dr. Kearns' GATT unConstitutionality arguments; at A5, that money alone to the inventor under 35 U.S. Code § 284 is in violation of Congress' actions; at A6, The Patent System and the Modern Economy; at A 21 transcript of Bittman (Reed Smith) voluntary withdrawal; at A 22 & A 23 events leading to AW&DC discharge for not representing Dr. Kearns (and the public) under the patent laws; at A 33 the fax of Mr. Henry withdrawing KLH, P.C.. Appendix Volume 3 contains documents of Kearns *Engineers* manufacturing abilites and exporting experience-just thumb through.

[6] In early times, {*Pennock* v. *Dialogue*, 2 Pet. 1; *Kendall* v. *Winsor*, 21 How. 322, 329; *Adams* v. *Burke*, 17 Wall. 453; *Motion-Picture Co.* v. *Universal Film Co.* 243 U.S. pp. 510-511; *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493; *United States* v. *Masonite Corp.*, 316 U.S. 265, 278 ... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ..."} the Supreme Court extols that the public interest in the patent law is dominant. *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665.

In the '80s, the Supreme Court exclaims the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohn and Haas Co.*, 448 U.S. 176, 221.

for the Supreme Court to address the problems appealed by Dr. Kearns under 35 U.S. Code § 281 that is supposed to provide a 'remedy' for patent infringement.

Be aware Dr. Kearns hasn't taken any of the damages as 'money is not adequate' in keeping with Chisum, REMEDIES FOR PATENT INFRINGEMENT, page 397: "The possibility of post-expiration equitable relief was raised but not resolved in *Roche Prods., Inc.* v *Bolar Pharmaceutical Co.*, 733 F.2d 858, 221 U.S.P.Q. 937 (Fed. Cir. 1984).

p. 2: After the Chrysler verdict [*by the Supreme Court*!], both AW&D and Reed Smith filed separate claims against Dr. Kearns to recover attorneys' fees and expenses incidental to their respective representations.

An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Jewelers Vigilance Committee, Inc.* v. *Ullenberg Corp.*, 853 F.2d 888 (Fed. Cir. 1988) citing at n. 3 *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948) (quoted with approval in *Northern Helex Co.* v. *United States*, 634 F.2d 557, 560, 225 Ct.Cl. 194 (1980). Under 28 U.S.C. § 1291, the Court of Appeals has jurisdiction only from *final* decisions of the United States District Courts. A Judgment is final for purposes of appeal when it terminates all issues presented in the litigation on the merits and leaves nothing to be done except to enforce by execution what has been determined. *Donovan* v. *Hayden Stone, Inc.*, 434 F.2d 619, 620 (6th Cir., 1970) citing *Heike* v. *United States*, 217 U.S. 423, 429, 30

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[7] *Quarterly Trade Deficit Hits 8-Year High*, by John M. Berry, The Washington Post, 18 August 1995; *The Other Deficit*, an Editorial, The Washington Post, 21 August 1995. See, CAFC Appeal No. 95-1334 Appendix Vol. Two (of 3), p. A-37 & A-38, respectively — "This country was the world's largest creditor 15 years ago ... since then the U.S. has become the world's largest debtor...";

S.Ct. 539, 54 L.ed. 821; *St. Louis, Iron Mountain & S. R.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28, 2 S.Ct. 6, 27 L.Ed. 638; *City of Louisa* v. *Levi*, 140 F.2d 512 (6th Cir.).

Both the Supersedeas Bond and the Final Judgment affirmed by the Court of Appeals for the Federal Circuit with certiorari denied by the Supreme Court require Chrysler Corp. to pay the full amount of § 284 Damages to Robert W. Kearns.

Although the claims in Chrysler Corp.'s Cross-Complaint and Third Party Complaint ... were pending for years, nothing affirmative toward granting them was stated in the final judgment. Clearly, Chrysler Corp. went beyond proper bounds in including Reed Smith Shaw & McClay in their continuing civil action 82-70748. Reed Smith Shaw & McClay filed a separate action against Dr. Kearns in the U.S. District Court for the District of Columbia, Civil No. 92-0501 before Judge Norma Holloway Johnson in which Dr. Kearns is allowed to present counter-claims before a jury. That case was transferred and is now 2:93-cv-74013 before Judge Avern Cohn. Those counter-claims have not been adjudicated. Fed. R. Civ. P. Rule 54

The Order on Applications for Attorney Fees of 26 August 1994 [Resp. RS App. 1a] was not yet an appealable order and is not a judgment which could then be enforced.

For the following, see Overview at Pet. p. 1.

On 16 October 1991 a claim by claimant Phyllis Kearns in 2:82-cv-70748 was entered (docket event #171 in *Kearns* v. *Chrysler Corp.*, Civil No. 70748). On 23 Dec. '91 a Motion by Reed Smith Shaw & McClay to impose a charging lien with brief was filed (docket event #260 in *Kearns* v. *Chrysler*, Civil No. 70748). On 28 May '92 a Notice by William Bittman of attorneys' charging lien was entered (docket event #465 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748). On 8 June '92 a Motion by Arnold, White & Durkee Corp. to impose a

charging lien, with exhibit was filed (docket event #478 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748). On 29 October 1992 a Final Judgment by Judge Cohn was filed[8,9] which in ¶ 6 dismissed with prejudice the claims, prayers, requests and motions encompassing the claim of claimant Phyllis Kearns, the prayers, requests and motions for charging liens of Mr. Bittman *et al.*, Reed Smith Shaw and McClay, and Arnold White & Durkee Corp. (docket event #571 in *Kearns* v. *Chrysler*, Civil No. 82-70748). On 6 July 1993 Arnold, White & Durkee Corp. filed a Notice of Appeal (Docket event #662 in *Kearns* v. *Chrysler Corp.*, Civil No. 82-70748 which became appeal No. 93-1468). On 22 September 1993 (Federal Circuit Docket event #10) Arnold, White & Durkee Corp.'s Appeal was dismissed by Federal Circuit Judge Archer. Claimant Phyllis Kearns and movant Mr. Bittman of Reed Smith Shaw & McClay did not appeal the dismissals with prejudice of their claim and prayers, request, motion, respectively. The above acts mean that the claim of Phyllis Kearns and the prayers, requests and motions for charging liens of Mr. Bittman, Reed Smith Shaw & McClay, and, Arnold, White &

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[8] A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and never ought to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. *Fayerweather* v. *Ritch*, 195 U.S. 276.

[9] Upon collateral attack the validity of a judgment cannot be determined except upon the record. (citing *Stockyards Nat. Bank* v. *Presnall*, 109 Tex. 32, 194 S.W. 384.) Unless the record negatives the existence of facts that are essential to the court's jurisdiction, the law conclusively presumes upon collateral attack that those facts were established by the evidence. *Crawford* v. *Mc Donald*, 88 Tex. 626, 630-632, 33 S.W. 325; *Templeton* v. *Ferguson*, 89 Tex. 47, 33 S.W. 329; *Moore* v. *Hanscom*, 101 Tex. 293, 106 S.W. 876 ...) in *Security Trust Co. of Austin* v. *Lipscomb County*, 180 S.W.2d 151, 156 (Supreme Court of Texas, 1944).

Durkee Corp. were dismissed by the CAFC and are now subject beyond 22 September 1993 to *res judicata*. The supervision of the Supreme Court is needed here.

The claim of KLH, P.C., *et al.*, has its origin in providing tutoring services to Dr. Kearns arising in *Kearns* v. *Chrysler Corporation*, 82-cv-70748. The domiciles of the litigants are diverse. KLH, *et al.* seek more than $50,000 from Dr. Kearns. As such the U.S. District Courts have original jurisdiction under 28 U.S.C. § 1332(a)(1). The Wayne County Circuit Court civil action was removed on 11 October 1994. There was no motion for remand far beyond the 30-day statutory time. Plaintiffs not moving to remand within statutory period are deemed to have waived any nonjurisdictional ground for remand. *Howard* v. *Northwest Airlines, Inc.*, 793 F.Supp. 129 (S.D. Tex. 1992). Personal injury plaintiffs' failure to initiate service of motion to remand within required 30-day period waived their objections to alleged untimely and improvident removal of case. *Elder* v. *Wal-Mart Stores, Inc.*, 751 F.Supp. 639 (E.D. La. 1990). Plaintiffs waived procedural defect present in defendant's removal petition of removing action ... where plaintiff did not meet statutory deadline requiring that motion to remand be brought within 30 days of notice of removal. *Leidolf by Warshafsky* v. *Eli Lilly and Co., Inc.*, 728 F.Supp. 1383 (E.D.Wis. 1990). The *KLH, P.C., et al.* v. *Kearns* civil action case was a jury trial assigned to U.S. District Judge Taylor no. 94-74753 in the U.S. District Court for the Eastern District of Michigan Southern Division when Chrysler continued 82-70748.

In summary, were the District Court to have subject matter as well as personal jurisdiction of the defendants listed in Chrysler Corp.'s Cross-Complaint and Third Party Complaint for Interpleader, Declaratory and Injunctive Relief there is still no adverse demands to be made on Chrysler Corp. at this time

as each defendant has had action before the court or have suits pending in distinct jury trials awaiting judgment. Yet the District Court distributed $10.7 million! Supervision is needed.

Dr. Kearns also submits that neither AW&DC or RSSM had standing in which to bring their respective motions and applications. Standing is a limitation on judicial power as well as the capacity of federal courts to receive jurisdiction. Without standing there is no case or controversy and no subject matter jurisdiction under Article III of the United States Constitution. Chief Justice Marshall has held that

> "judicial power is capable of acting only when the subject is submitted in a case, and a case only arises when a party asserts his rights in a form prescribed by law. *Osborn* v. *U.S. Bank*, 9 Wheat (22 U.S.) 738, 819.

The Florida Court has questioned the dismissed or fired lawyers' right to assert a motion in the case they have left. Like the lawyers in *Scuteri, et al.* v. *Estate of Philip Revitz, et al.*, 829 F.Supp. 387 (S.D.Fla. 1993) the Reed Smith and AWD's

> "sole basis for appearing in this case is that it represented Plaintiffs several years ago. There is no question that (they) are not a party."

Likewise the Eleventh Circuit has held that a non-party lacks standing to bring a Rule 60(b) motion. *Kem Manufacturing Corp.* v. *Wilder*, 817 F.2d 1517 (11th Cir. 1987). Since Rule 59 refers only to parties, and is thus more restrictive than Rule 60, it is logical to conclude that the same analysis applies. Accordingly, non-parties would not have standing under any other provision such as Rule 7(a) which provides for motions. In short, the Federal Rules refer to parties and RSSM and AW&DC and KLM, P.C. et al. do not qualify as parties.

"[M]ovants are non-parties since they have failed to move for leave to intervene in this proceeding for purposes of lifting the protective order thus they have no standing to bring this motion." *See, Martindell*, v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2d Cir. 1979) and cases cited therein.

It is generally viewed that motion can only be made by a party or record. *Gibbs* v. *Ewing*, 94 Fla. 236, 113 So. 730. The procedure allowed by the District Court resulted in a situation where AW&DC and RSSM and others were allowed to "plead" without giving Dr. Kearns an opportunity to Answer the 'Complaint' and assert his defenses under Rule 12. By seeking relief outside the framework of the Federal Rules, those seeking funds were able to avoid the requirements of the Fed.R.Civ.P.

The procedure followed also enabled the attorneys to proceed avoiding the local rules. For example, the docket sheets reflect that neither attorneys filed new appearances in the case or moved to proceed *pro hac vice* in the Michigan Federal Court system. The attorneys first appearance was no longer viable.

Although there is no specific procedure devised under Michigan law, established Michigan Law demonstrates an attorney who elects to seek relief by imposition of a charging lien must proceed by intervention. *See, Kysor Industrial Corp.* v. *D.M. Liquidating Co., et al.*, 161 N.W.2d 520 (Mich. App. 1975) (Law firm Colista, Baum & Domonkos identified as "Intervening Defendants appellees"), or bring a separate action. *Rubel* v. *Brimacombe & Schlecte*, 86 B.R. (E.D. Mich. 1988). Thus, in the cases located which dealt with or recognized an attorney's charging lien, the attorney was identified as an intervenor or party.

Dr. Kearns did not consent to have the matter tried before a magistrate and the district court has no authority to refer the matter to a magistrate under Michigan law, the Federal Rules or under 28 U.S. Code § 636. Federal law is higher than state law. Federal law is the law of the state where the services were performed. *Chrysler* was performed in the state of Michigan. Michigan state law is common law. "Federal courts recognize only those liens on a cause of action in behalf of an attorney which are under local law." *Bazzano* v. *Rockwell*

Intern. Corp., 564 F.Supp. 121 (E.D. Mo., 1983). "Under Michigan law, no statute governs attorney liens so they rest entirely upon common law. ... . An attorney's lien on a judgment is not recognized at common law unless declared by statute, but the lien on the papers is." Cited with approval. AW&DC sent Dr. Kearns only copies of the papers. AW&DC exercised their retaining lien *Ambrose* v. *Detroit Edison Co.*, 237 N.W.2d 520, a Michigan case which was before the Court of Appeals of Michigan p. 520:

2. Attorney and Client (key) 186

Attorney who withdraws from suit without cause loses his inchoate right to lien on ultimate recovery.

In this state (Michigan) there can be no question but an attorney between himself and his client has a lien upon a judgment obtained through the attorney's efforts for services and disbursements in a particular case. *Shank* v. *Lippman*, 249 Mich. 22, 227 N.W. 710 as cited with approval in *Framm* v. *Kelley, Sheriff, et al.*, 256 N.W. 552 (Supreme Court of Michigan, Oct. 1, '34, as cited with approval in *Bruce* v. *U.S.*, v. *United States*, 127 F.Supp. 858 (D.C. E.D.Mich. N.D.,1955).

Attorney's lien cannot attach until some recovery is had for client (*Smith-Hurd Rev.* St. Ill. 1929, c. 13, § 14).

Here, Mr. Bittman *et al.* and Reed Smith withdrew before they obtained a truly-final judgment in *Kearns* v. *Chrysler, et al.* and thus secured no fruit upon which to attach their charging lien, either. "If the attorney's work is sterile and produces no fruit from his labor, then he has no lien." *Midvale Motors, Inc.* v *Saunders*, 422 P.2d 938, 940 Supreme Court of Utah 1968. Without obtaining said fruits, Reed Smith is not entitled to funds from Judge Cohn's disbursement of Chrysler's money.

Dr. Kearns Replies to Reed Smith's ARGUMENT

The various "questions" raised by Dr. Kearns' latest Petition for Writ of Certiorari

relate to matters decided in all three of the procedural stages outlined in the previous section.

Dr. Kearns' 1st Question includes the fact that the first 35 U.S.C. § 281 civil action he filed for a 'remedy' for patent infringement did not come to trial at all for 18 years while the Judiciary enforce a single time period routine-life of 17 years.

Dr. Kearns' 2nd Question is a Constitutional challenge as explained in his Petition.

Scholars claim the specific mechanism for all people to attain equal rights and opportunites is not in the Constitution. It is Const. Art. I § 8 cl 8 if enforced by the Judicial Branch. That news could change the study habits of our youth. To find Article 46 proportional here would increase exports +4.8%.

The 4th Question's "from the date of this grant" is not in the words of 35 U.S. Code § 154 and the word term therein refers to a quantity of time that does not state when it begins. An additional word is required to state when a term begins, *e.g.*, fall term, spring term. That additional word is not present.

Dr. Kearns' 5th Question is viable to this Petition since the District Court raised the stakes to the inventor in this Petition by requiring the infringement to be found willful by the jury.

The 6th Question is viable to this Petition since if this very same case had been filed in the 11th Circuit the result would have been in Dr. Kearns' favor — an opposite end-result.

The 7th Question asks if an invention is infringed by 43 defendants is the *pro se* inventor of Intermittent Windshield Wiper Systems to be punished under the Fed. R. Civ. P. for burdening the Judiciary? Do we stop successful inventions or stop industry from stealing or stop the Judiciary from burden?

The 8th & 9th Question were shown viable, *supra*..

Dr. Kearns Replies to Reed Smith's CONCLUSION

Obtain the publics' interest — protect jobs — grant certiorari.